

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Applications of Guam Cellular and Paging, Inc.
and DoCoMo Guam Holdings, Inc.
For Consent to Transfer Control of Licenses and
Authorizations
File Nos. 0002556700, ITC-T/C-20060405-00234
and
Applications of Guam Cellular and Paging, Inc.
and Guam Wireless Telephone Company, L.L.C.
For Consent to Assignment of Licenses and
Authorizations
File Nos. 0002553437, ITC-ASG-20060404-
00181
and
Petition for Declaratory Ruling that the
Transaction Is Consistent with Section 310(b)(4)
of the Communications Act
File No. ISP-PDR-20050404-00005
WT Docket No. 06-96

MEMORANDUM OPINION AND ORDER AND DECLARATORY RULING

Adopted: November 9, 2006

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By the Commission: Commissioner Copps concurring and issuing a statement.

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**I. INTRODUCTION**

1. In this Order, we consider applications filed by Guam Cellular and Paging, Inc. (“Guam Cellular”), Guam Wireless Telephone Company, L.L.C. (“Guam Wireless”), DoCoMo Guam Holdings, Inc. (“DoCoMo Guam”), and NTT DoCoMo, Inc. (“DoCoMo”) (collectively, the “Applicants”). The Applicants seek Commission approval of: 1) the transfer of control of Guam Cellular to DoCoMo Guam, a wholly-owned subsidiary of DoCoMo, which is a publicly traded Japanese corporation; and 2) the assignment of licenses and authorizations held by Guam Wireless to Guam Cellular, as controlled directly by DoCoMo Guam (“Proposed Transaction”).<sup>1</sup> The proposed transfer and assignment will occur simultaneously, and, upon consummation, DoCoMo, through DoCoMo Guam, will indirectly control Guam Cellular, which will hold its own licenses and authorizations and Guam Wireless’s licenses and authorizations.

<sup>1</sup> See Application to Transfer Control of Licenses Held by Guam Cellular and Paging, Inc. to DoCoMo Guam Holdings, Inc., File No. 0002556700 (filed Apr. 4, 2006) (“Application”); Application to Assign Licenses Held by Guam Wireless Telephone Company, L.L.C. to Guam Cellular and Paging, Inc., File No. 0002553437 (filed Apr. 4, 2006); File No. 0002556700 has been designated the lead Application. The other application contains an exhibit referring to the exhibits attached to file no. 0002556700. Thus, for convenience, when referring to these applications, we only cite to the lead Application.

2. The Applicants generally seek Commission approval of the assignment and transfer of control of licenses for Part 22 Cellular Radiotelephone Service (“Cellular”), Part 22 Paging and Radiotelephone Service (“Paging”), Part 24 Personal Communications Service (“PCS”), Part 27 Wireless Communications Service (“WCS”), Part 27 Lower 700 MHz Service (“Lower 700 MHz”), Part 90 Industrial/Business Pool Service (“IB Pool”), and Part 101 Common Carrier Fixed Point-to-Point Microwave Service (“Microwave”) held by Guam Wireless and Guam Cellular to DoCoMo Guam. The Applicants also filed applications seeking consent to the transfer of control of a domestic section 214 authorization and two international section 214 authorizations from Guam Cellular to DoCoMo Guam and an application seeking consent to the assignment of one international section 214 authorization from Guam Wireless to Guam Cellular.<sup>2</sup> Additionally, the Applicants have filed a Petition requesting a Declaratory Ruling that it would not serve the public interest to prohibit the 100 percent indirect foreign ownership by DoCoMo of Guam Cellular (through DoCoMo Guam) under section 310(b)(4) of the Act.<sup>3</sup>

## II. BACKGROUND

### A. Description of Applicants

#### 1. Guam Wireless Telephone Company, L.L.C.

3. Guam Wireless, a limited liability company organized under the laws of the Commonwealth of Virginia, provides mobile telephony services, including text messaging<sup>4</sup> and roaming, under the brand name HafaTEL, to residents and visitors to Guam and the Commonwealth of the Northern Mariana Islands (“CNMI”) using its Global Systems for Mobile Communications (“GSM”) network.<sup>5</sup> It offers both prepaid and postpaid services to its customers.<sup>6</sup> Guam Wireless holds the PCS B-block license, KNLF300, for the Guam-Northern Mariana Islands Major Trading Area (“MTA”), which has a total resident population of approximately 225,000.<sup>7</sup> Guam Wireless is DoCoMo’s roaming partner in both

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<sup>2</sup> See Application to Transfer Control of International Section 214 Authorizations Held by Guam Cellular and Paging, Inc. to DoCoMo Guam Holdings, Inc., File No. ITC-T/C-20060405-00234, at 1 (filed Apr. 5, 2006); Application to Assign an International Section 214 Authorization Held by Guam Wireless Telephone Company, L.L.C. to Guam Cellular and Paging, Inc., File No. ITC-ASG-20060404-00181, at 1 (filed Apr. 4, 2006) (collectively, “International Section 214 Applications”). See also Guam Cellular and Paging, Inc., Guam Wireless Telephone Company, L.L.C., and NTT DoCoMo, Inc. Application for Assignment, Transfer of Control, and Petition for Declaratory Ruling, Attachment 1, at 6-7 (filed Apr. 4, 2006) (requesting authority to transfer domestic blanket section 214 authority).

<sup>3</sup> NTT DoCoMo, Inc., Petition for Declaratory Ruling, File No. ISP-PDR-20060404-00005 (filed Apr. 4, 2006) (“Petition for Declaratory Ruling”).

<sup>4</sup> HafaTel, SMS/HafaTXT, <http://www.hafatel.com/sms.htm> (last visited Oct. 6, 2006).

<sup>5</sup> Application, Attachment, at 5-6; NTT DoCoMo to Acquire Guam Cellular and Guam Wireless, Press Release, at 1 (Mar. 20, 2006) (“DoCoMo Press Release”), available at <http://www.nttdocomo.com/pr/2006/001249.html> (last visited Oct. 6, 2006); HafaTel News, Guam Wireless Telephone Company, LLC DBA HafaTel Public Announcement, [http://www.hafatel.com/special\\_ann.htm](http://www.hafatel.com/special_ann.htm) (last visited Oct. 6, 2006) (“Guam Wireless Press Release”); HafaTel, About Us, <http://www.hafatel.com/about.htm> (last visited Oct. 6, 2006) (“HafaTel About Us”); HafaTel, FAQs, <http://www.hafatel.com/faq.htm> (last visited Oct. 6, 2006) (“HafaTel FAQs”).

<sup>6</sup> HafaTel, [www.hafatel.com](http://www.hafatel.com) (last visited Oct. 6, 2006); HafaTel, Prepaid, [www.hafatel.com/prepaid.htm](http://www.hafatel.com/prepaid.htm) (last visited Oct. 6, 2006); HafaTel, Postpaid, [www.hafatel.com/postpaid.htm](http://www.hafatel.com/postpaid.htm) (last visited Oct. 6, 2006).

<sup>7</sup> Application, Attachment, at 5; HafaTel FAQ at 1.

territories.<sup>8</sup> Guam Wireless has also entered into more than 60 agreements in countries throughout the world to provide “seamless” international roaming for its customers.<sup>9</sup> Guam Wireless also holds an international section 214 authorization to provide international telecommunications services on a global resale and facilities basis.<sup>10</sup>

## 2. Guam Cellular and Paging, Inc.

4. Guam Cellular is a privately held corporation organized under the laws of Guam.<sup>11</sup> It holds the Cellular A-block license in the CNMI (KNKQ367) and also in Guam (KNKN828), providing mobile wireless telephone services to residents and visitors in both territories using the Code Division Multiple Access (“CDMA”) standard.<sup>12</sup> Guam Cellular also [Redacted].<sup>13</sup> Additionally, Guam Cellular holds Paging, Microwave, IB Pool, WCS, and Lower 700 MHz licenses.<sup>14</sup> Guam Cellular also holds two international section 214 authorizations to provide international telecommunications services on a global resale and facilities basis,<sup>15</sup> as well as a blanket domestic section 214 authorization used to provide business and residential wireline domestic long distance (via direct dial and calling card) in both Guam and the CNMI.<sup>16</sup> In addition, Guam Cellular provides dial-up and DSL Internet access services.<sup>17</sup> In Guam, the company provides service under the brand name “Guamcell Communications;” while in the CNMI, it provides service under the brand name “Saipancell Communications.”<sup>18</sup>

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<sup>8</sup> DoCoMo Press Release at 1.

<sup>9</sup> HafaTel, News, <http://www.hafatel.com/archive> (last visited Oct. 6, 2006); HafaTel, Roaming, <http://www.hafatel.com/roaming.htm> (last visited Oct. 6, 2006); HafaTel, Roaming, International Roaming, <http://www.hafatel.com/rlocations.htm> (last visited Oct. 6, 2006).

<sup>10</sup> See International Section 214 Applications, Attachment 1, at 2 (discussing Guam Wireless’s international section 214 authorization, File No. ITC-214-20000507-00304); see also Application, Attachment, at 5, Exhibit A.

<sup>11</sup> Application, Attachment, at 4.

<sup>12</sup> *Id.*; DoCoMo Press Release at 1.

<sup>13</sup> See Letter from Cheryl A. Tritt, Counsel to NTT DoCoMo, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1 (Sept. 29, 2006) (“Response to WTB Information Request”).

<sup>14</sup> Application, Attachment, at 4. For a complete list of licenses and authorizations held by Guam Cellular, see Application, Attachment, at Exhibit A.

<sup>15</sup> See International Section 214 Applications, Attachment 1, at 2 (discussing Guam Cellular’s international section 214 authorizations, File Nos. ITC-214-19961120-00583 (for global resold services) and ITC-214-20040517-00201 (for global facilities-based services)); Application, Attachment, at 4, Exhibit A.

<sup>16</sup> See Application, Attachment, at 4-5.

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 4; DoCoMo Press Release at 1. See generally Guamcell Communications, <http://www.guamcell.com/main/index.php> (last visited Oct. 6, 2006); Saipancell Communications, <http://www.saipancell.com/main/index.php> (last visited Oct. 6, 2006).

### 3. NTT DoCoMo, Inc.

5. DoCoMo is a publicly-traded Japanese corporation<sup>19</sup> which, together with its wholly-owned regional subsidiaries, provides mobile wireless voice and data communications services to more than 50 million subscribers throughout Japan.<sup>20</sup> DoCoMo's multimedia services include i-mode<sup>®</sup>, a mobile Internet service that provides email and Internet access to more than 45 million subscribers, and FOMA<sup>®</sup>, a 3G mobile service launched in 2001 based on W-CDMA technology.<sup>21</sup> In addition to voice and data communications services (including, for example, capabilities to receive news, stock quotes, weather reports, and telephone directories), DoCoMo offers advanced services that include, *inter alia*, video capabilities, games, mobile banking and other financial services, restaurant guides and reservations, travel reservations, and concert and sporting event tickets, as well as remote monitoring services and remote learning systems via videophones.<sup>22</sup>

6. In connection with the proposed transaction with Guam Cellular and Guam Wireless,<sup>23</sup> DoCoMo has established DoCoMo Guam, a new wholly-owned subsidiary organized under the laws of Guam.<sup>24</sup> Neither DoCoMo, nor DoCoMo Guam, nor any of DoCoMo's other existing subsidiaries currently holds FCC authorizations.<sup>25</sup> DoCoMo has a limited U.S. presence primarily focused on mobile communications technology research and development, general business development, and public relations.<sup>26</sup> It owns DoCoMo Communications Laboratories USA, Inc., a research lab facility in San Jose, California, as well as DoCoMo Capital, Inc., also located in San Jose, to invest in venture companies that develop advanced mobile communication technologies.<sup>27</sup> In addition, NTT DoCoMo USA, Inc., one of DoCoMo's subsidiaries, has launched a wireless LAN access service called

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<sup>19</sup> Application, Attachment, at 6; DoCoMo is listed on the Tokyo, London and New York stock exchanges. Application, Attachment, at 9; DoCoMo Press Release at 1; Guamcell Communications, Press Release, at 2 (Mar. 20, 2006) ("Guamcell Press Release"), available at [http://www.guamcell.com/main/index.php?pg=about\\_guamcell&sub=press\\_release\\_06](http://www.guamcell.com/main/index.php?pg=about_guamcell&sub=press_release_06) (last visited Oct. 6, 2006); Saipancell Communications, Press Release, at 2 (Mar. 20, 2006) ("Saipancell Press Release"), available at [http://www.saipancell.com/main/index.php?pg=about\\_saipancell&sub=press\\_release\\_06](http://www.saipancell.com/main/index.php?pg=about_saipancell&sub=press_release_06) (last visited Oct. 6, 2006).

<sup>20</sup> See Application, Attachment, at 6 n.8; DoCoMo Press Release at 1; Guamcell Press Release at 1; Saipancell Press Release at 1.

<sup>21</sup> Application, Attachment, at 6; DoCoMo Press Release at 1; Guamcell Press Release at 1-2; Saipancell Press Release at 1.

<sup>22</sup> Application, Attachment, at 6.

<sup>23</sup> See discussion *infra* Section II.B (Description of Transaction).

<sup>24</sup> Application, Attachment, at i.

<sup>25</sup> *Id.* at 7. The Applicants note that DoCoMo once had a minority interest in AT&T Wireless Services, Inc. This interest was purchased by Cingular Wireless as part of the Cingular-AT&T Wireless merger. See Application, Attachment, at 8 n.13; see also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21528, 21534 ¶ 9, n.91 (2004) ("*Cingular-AT&T Wireless Order*") (discussing DoCoMo's 16% interest in AT&T Wireless and the extinguishment of this interest as part of the Cingular-AT&T Wireless merger).

<sup>26</sup> Application, Attachment, at 7.

<sup>27</sup> *Id.* at 8.

“Namikiteru” to provide high-speed Internet access to Japanese-speaking residents in the United States.<sup>28</sup> Namikiteru has a roaming arrangement with T-Mobile USA, Inc.<sup>29</sup>

7. Nippon Telegraph and Telephone Corporation (“NTT”), Japan’s largest telecommunications company, currently holds an approximately 62 percent direct voting and equity ownership interest in DoCoMo.<sup>30</sup> In 1985, NTT (previously wholly-owned by the Japanese government) was incorporated as a limited liability joint stock corporation.<sup>31</sup> By law, the Japanese government must own at least one-third of the total number of issued shares of NTT.<sup>32</sup> The Applicants report that as of December 2005, the Japanese government held a 38.37 percent direct voting and equity ownership interest in NTT.<sup>33</sup>

8. Since 1999, NTT has been organized as a holding company for a group of companies that provide the following five primary lines of business: regional communications services; long distance/international services; mobile services; data services; and other services such as billing, research and development, and marketing.<sup>34</sup> In 1991, DoCoMo was incorporated as a subsidiary of NTT and took over NTT’s wireless businesses the following year.<sup>35</sup>

## B. Description of Transaction

9. On March 20, 2006, DoCoMo entered into a Share Purchase Agreement with the Shareholders of Guam Cellular and an Asset Purchase Agreement with Guam Wireless.<sup>36</sup> The combined value of this Proposed Transaction is approximately \$71.8 million.<sup>37</sup> To effectuate the Share Purchase Agreement, DoCoMo formed DoCoMo Guam, which in a cash transaction will acquire 100 percent of the common shares of Guam Cellular.<sup>38</sup> Under the Asset Purchase Agreement, DoCoMo Guam will acquire for cash consideration certain assets and properties, including the FCC licenses, of Guam Wireless.<sup>39</sup> To effectuate the acquisition, Guam Wireless will assign its licenses and assets to Guam Cellular, as controlled by DoCoMo Guam.<sup>40</sup> Upon consummation of the Proposed Transaction, Guam Cellular will,

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<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 9. The Applicants explain that NTT’s ownership interest in DoCoMo fluctuates and “generally has decreased over time since DoCoMo became a publicly traded company.” *Id.*

<sup>31</sup> *Id.* at 18. NTT’s shares are listed on the Tokyo, New York, and London stock exchanges as well as other stock exchanges in Japan. *See id.*

<sup>32</sup> *Id.* at 19.

<sup>33</sup> *Id.* at 9, 19. The Applicants note that, as of March 31, 2006, the Japanese government interest in NTT had fluctuated slightly, representing a 38.53% voting and equity ownership interest. *See infra* ¶ 61 & note 220.

<sup>34</sup> Application, Attachment, at 18.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.*; DoCoMo Press Release at 1.

<sup>38</sup> Application, Attachment, at 21; DoCoMo Press Release at 1.

<sup>39</sup> Application, Attachment, at 21.

<sup>40</sup> *Id.*

in addition to its own assets and operations, hold the assets and continue to operate the business of Guam Wireless.<sup>41</sup>

10. As a result of this Proposed Transaction, DoCoMo (through DoCoMo Guam) would acquire cellular and PCS spectrum covering the entire Guam and CNMI market.<sup>42</sup> The Applicants state that, for the time being, DoCoMo will continue to operate two separate networks in Guam and the CNMI.<sup>43</sup> DoCoMo states that it plans to enhance the quality of Guam Wireless's GSM network by adding General Packet Radio Services ("GPRS") capability and deploying a Wideband Code Division Multiple Access ("W-CDMA") network for third generation services over Guam Cellular's CDMA network.<sup>44</sup>

### C. Application Review Process

11. On April 11, 2006, pursuant to section 310(d) of the Communications Act,<sup>45</sup> the Applicants filed applications seeking consent to the proposed transfer of control of licenses held by Guam Cellular to DoCoMo Guam and assignment of licenses held by Guam Wireless to Guam Cellular.<sup>46</sup> Pursuant to section 214 of the Communications Act,<sup>47</sup> the Applicants also filed section 214 applications seeking Commission approval of the transfer of control of two international section 214 authorizations and a domestic section 214 authorization to DoCoMo Guam and the assignment of an international section 214 authorization from Guam Wireless to Guam Cellular.<sup>48</sup> On May 10, 2006, the Commission released a Public Notice seeking public comment on the Proposed Transaction.<sup>49</sup> In response to the Comment Public Notice, the Commission received a petition to deny the applications filed by TeleGuam Holdings, LLC ("TeleGuam"),<sup>50</sup> six letters supporting the applications,<sup>51</sup> one comment filed by the CDMA

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 22. The Applicants state that they "[Redacted]." Response to WTB Information Request at 1.

<sup>44</sup> Application, Attachment, at 22.

<sup>45</sup> 47 U.S.C. § 310(d).

<sup>46</sup> *See supra* note 1 and accompanying text.

<sup>47</sup> 47 U.S.C. § 214.

<sup>48</sup> *See supra* note 2 and accompanying text.

<sup>49</sup> NTT DoCoMo, Inc., Guam Cellular and Paging, Inc., and Guam Wireless Telephone Company, L.L.C. Seek FCC Consent to Assign and Transfer Control of Licenses and Authorizations and Request a Declaratory Ruling on Foreign Ownership, WT Docket No. 06-96, *Public Notice*, 21 FCC Rcd 4835 (2006) ("Comment Public Notice"). The Comment Public Notice set due dates of June 6, 2006 for Petitions to Deny, June 19, 2006 for Oppositions, and June 26, 2006 for Replies. *See id.* at 4835.

<sup>50</sup> Petition to Deny and Comments of TeleGuam Holdings, LLC, filed June 9, 2006 ("Petition to Deny"). The Applicants filed an Opposition to the Petition to Deny on June 22, 2006. Guam Cellular and Paging, Inc., Guam Wireless Telephone Company, L.L.C., and NTT DoCoMo, Inc., Opposition, filed June 22, 2006 ("Opposition"). TeleGuam filed a Reply to the Opposition to the Petition to Deny on June 29, 2006. TeleGuam Holdings, LLC, Reply, filed June 29, 2006 ("Reply"). All pleadings and comments are available on the Commission's Electronic Comment Filing System ("ECFS") at [www.fcc.gov/cgb/ecfs/](http://www.fcc.gov/cgb/ecfs/).

<sup>51</sup> Letter from Benigno R. Fital, Governor, Commonwealth of the Northern Mariana Islands, to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission (June 22, 2006) ("Comments of CNMI Governor"); Letter from Jerry Tan, Chairman, Board of Directors, Marianas Visitors Authority, to Secretary of the (continued....)

Development Group (“CDG”),<sup>52</sup> and a letter filed jointly by the Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and the Department of Homeland Security (“DHS”) (together, the “Executive Branch Entities”) requesting that the Commission defer action on the applications until the Executive Branch Entities resolved any potential national security, law enforcement, and public safety issues.<sup>53</sup> On October 19, 2006, the Executive Branch Entities filed a petition (“Executive Branch Petition”) asking the Commission to condition its grant of the Applications on Applicants’ compliance with a network security agreement signed by Guam Cellular, DoCoMo Guam, and the Executive Branch Entities (“Executive Branch Agreement”).<sup>54</sup>

12. Both the International Bureau and Wireless Telecommunications Bureau issued to the Applicants requests for additional information, dated June 26, 2006 and September 15, 2006, respectively.<sup>55</sup> The Applicants responded to these requests on July 24, 2006 and September 29, 2006, respectively.<sup>56</sup> Further information relating to the outstanding capital stock of DoCoMo was supplied to the International Bureau on September 27, 2006.<sup>57</sup> Additionally, the Wireless Telecommunications Bureau issued requests for and received information regarding subscribership numbers and coverage areas

(Continued from previous page) \_\_\_\_\_

FCC (June 20, 2006) (“Comments of Marianas Visitors Authority”); Letter from Gerald S.A. Perez, General Manager, Guam Visitors Bureau, to Secretary of the FCC (June 23, 2006) (“Comments of Guam Visitors Bureau”); Letter from J. Michael Fitzgerald, Chairman, Commonwealth Telecommunications Commission, to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission (July 4, 2006) (“Comments of Commonwealth Telecommunications Commission”); Letter from Pedro A. Tenorio, Resident Representative to the United States, United States Commonwealth of the Northern Mariana Islands, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 6, 2006, refiled July 10, 2006) (“Comments of CNMI Resident Representative”); Letter from Felix P. Camacho, Governor, Guam, to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission (July 12, 2006) (“Comments of Guam Governor”).

<sup>52</sup> Letter from Perry LaForge, CDMA Development Group, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006) (“Comments of CDG”) (raising national security and roaming issues and requesting that the Commission seek comments from the Executive Branch on these issues, “if the relevant agencies are not already weighing such issues as part of the ‘Team Telecom’ review.”).

<sup>53</sup> Letter from Laura H. Parsky, Deputy Assistant Attorney General, United States Department of Justice, Criminal Division, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 8, 2006).

<sup>54</sup> Petition to Adopt Conditions to Authorizations and Licenses (Oct. 19, 2006) (“Executive Branch Petition”). *See infra* Section VII (National Security, Law Enforcement, Foreign Policy, and Trade Concerns).

<sup>55</sup> Letter from James Ball, Chief, Policy Division, International Bureau, Federal Communications Commission, to Cheryl A. Tritt, Morrison & Foerster LLP (June 26, 2006) (“IB Information Request”); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Cheryl A. Tritt, Morrison & Foerster LLP, David A. LaFuria, Lukas, Nace, Gutierrez and Sachs, Chartered, and Thomas K. Crowe, Law Offices of Thomas K. Crowe, PC (Sept. 15, 2006) (“WTB Information Request”).

<sup>56</sup> Letter from Cheryl A. Tritt, Counsel for NTT DoCoMo, Inc., to James Ball, Chief, Policy Division, International Bureau, Federal Communications Commission (July 24, 2006) (“July 24, 2006 Response to IB Information Request”); Response to WTB Information Request at 1-8.

<sup>57</sup> Letter from Cheryl A. Tritt, Counsel for NTT DoCoMo, Inc., to Susan O’Connell, Policy Division, International Bureau, Federal Communications Commission (Sept. 27, 2006) (“September 27, 2006 Response to IB Information Request”).

from the other mobile telephony providers in Guam and CNMI.<sup>58</sup> The Wireless Telecommunications Bureau adopted a protective order, dated September 15, 2006, pursuant to which the Applicants and third parties would be allowed to review confidential or proprietary documents submitted in the proceeding.<sup>59</sup>

### III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

13. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the applicants involved with each proposed transaction have demonstrated that the respective proposed assignments and transfers of control of licenses and authorizations would serve the public interest, convenience, and necessity.<sup>60</sup> In applying our public interest test, we must assess whether

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<sup>58</sup> Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Richard C. Yu, Choice Phone LLC, and Thomas K. Crowe, Esq., Law Offices of Thomas K. Crowe, PC (Sept. 15, 2006); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Anthony S. Mosely, PTI Pacifica Inc. (Pacific Telecom Inc.), and Kenneth D. Patrich, Esq., Wilkinson Barker Knauer, LLP (Sept. 15, 2006); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Robert Taylor, Pulse Mobile LLC and Paul Gagnier, Esq., Swidler Berlin, LLP (Sept. 15, 2006); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Robert H. McNamara, Nextel License Holdings 4, Inc. (Sept. 15, 2006); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Richard C. Yu, Wave Runner, LLC, and Gregory E. Kunkle, Esq., Law Offices of Thomas K. Crowe, PC (Sept. 15, 2006); Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, to John M. Borlas, IT&E Overseas, Inc., and Richard D. Rubino, Esq., Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (Sept. 15, 2006) (collectively, "Third-Party Information Requests").

The Third-Party Information Requests stated that responses should be delivered to the Commission by September 29, 2006. See Third-Party Information Requests at 2. IT&E Overseas, Inc., Nextel License Holdings 4, Inc., PTI Pacifica Inc., Pulse Mobile, LLC, and WaveRunner LLC filed their responses on September 29, 2006. Letter from John A. Prendergast and Richard D. Rubino, Counsel for IT&E Overseas, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006) ("IT&E Response"); Letter from Robert H. McNamara, Director, Spectrum Management, Sprint Nextel, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 29, 2006) ("Nextel Response"); Letter from Kenneth D. Patrich, Wilkinson Barker Knauer LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006, clarification filed Oct. 13, 2006); Letter from Eliot J. Greenwald, Bingham McCutchen, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006) ("Pulse Mobile Response"); Letter from Robert F. Kelly, Jr., Chief Technical Officer, Wave Runner, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006) ("Wave Runner Response"). Choice Phone, LLC informed the Commission that it would file its response by October 13, 2006. Letter from Richard Yu, Director, Choice Phone LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2006). Choice Phone LLC filed its response on October 13, 2006. Letter from Richard Yu, Director, Choice Phone LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 13, 2006, 2006) ("Choice Phone Response") (collectively, "Third-Party Responses").

<sup>59</sup> Guam Cellular and Paging, Inc., Transferor and Assignee, and Guam Wireless Telephone Company, L.L.C., Assignor, and NTT DoCoMo, Inc., Transferee, WT Docket No. 06-96, *Protective Order*, DA 06-1877 (rel. Sept. 15, 2006) ("Protective Order").

<sup>60</sup> 47 U.S.C. §§ 214(a), 310(d).

the proposed transaction complies with the specific provisions of the Communications Act,<sup>61</sup> the Commission's rules, and federal communications policy.<sup>62</sup> If a proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.<sup>63</sup> The Commission then employs a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.<sup>64</sup> The applicants involved with each transaction bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>65</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.<sup>66</sup>

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<sup>61</sup> Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g.*, Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., WT Docket No. 05-339, *Memorandum Opinion and Order*, FCC 06-146, at 10 ¶ 16 (rel. Oct. 2, 2006) (“*ALLTEL-Midwest Wireless Order*”); Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, *Memorandum Opinion and Order*, 21 FCC Rcd 7358, 7360 ¶ 7 (2006) (“*Sprint Nextel-Nextel Partners Order*”); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) (“*SBC-AT&T Order*”); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, *Memorandum Opinion and Order*, 20 FCC Rcd 18433, 18442 ¶ 16 (2005) (“*Verizon-MCI Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) (“*Sprint-Nextel Order*”); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13062 ¶ 17 (2005) (“*ALLTEL-Western Wireless Order*”); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542 ¶ 40.

<sup>62</sup> *See, e.g.*, *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40.

<sup>63</sup> *See, e.g.*, *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

<sup>64</sup> *See, e.g.*, *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062-63 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

<sup>65</sup> *See, e.g.*, *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

<sup>66</sup> 47 U.S.C. § 309(e). *See also* *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300-01 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543-44 ¶ 40. Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see* *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

14. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>67</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the Proposed Transaction meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules.<sup>68</sup> In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors and/or assignors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing.<sup>69</sup> Conversely, section 310(d) obligates the Commission to consider whether the proposed transferee and/or assignee is qualified to hold Commission licenses.<sup>70</sup> When evaluating the qualifications of a potential licensee, the Commission previously has stated that it will review allegations of misconduct directly before it,<sup>71</sup> as well as conduct that takes place outside of the Commission.<sup>72</sup> In this proceeding, no issues have been raised with respect

<sup>67</sup> See 47 U.S.C. §§ 308, 310(d); see also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 11 ¶ 17; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18525-26 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd 21546 ¶ 44.

<sup>68</sup> See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 10 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd 21546 ¶ 44.

<sup>69</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 11 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7362 ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See also Stephen F. Sewell, *Assignment and Transfers of Control of FCC Authorizations under Section 310 (d) of the Communications Act of 1934*, 43 FED. COMM. L. J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee’s basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

<sup>70</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 11 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7362 ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>71</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 11 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission will consider any violation of any provision of the Act, or of the Commission’s rules or policies, as predictive of an applicant’s future truthfulness and reliability and, thus, as having a bearing on an applicant’s character qualifications. *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 172; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 184; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47; Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, Gen. Docket No. 81-500, *Report and Order and Policy Statement*, 100 F.C.C. 2d 1179, 1209-10 ¶ 57 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992).

<sup>72</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 11 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission previously has determined that in its review of character issues, it will consider forms of adjudicated, non-Commission related misconduct that include: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. See, e.g., *SBC-AT&T Order*, 20 FCC Rcd at 18379 (continued....)

to the basic qualifications of Guam Cellular, Guam Wireless, DoCoMo Guam, or DoCoMo. We find that, at this time, there is no reason to evaluate the qualifications of these entities.

15. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”<sup>73</sup> which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.<sup>74</sup> Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.<sup>75</sup> In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>76</sup>

16. In determining the competitive effects of the proposed transaction, our analysis is informed by, but not limited to, traditional antitrust principles.<sup>77</sup> Because the Commission is charged with

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¶ 172; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 184; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.86; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47.

<sup>73</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>74</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon-MCI Order*, 20 FCC Rcd at 18443-44 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>75</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18301 ¶ 17; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064-65 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>76</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18301-02 ¶ 17; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>77</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977-78 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42. See also *Satellite Business Systems, Memorandum, Opinion, Order, Authorization and Certification*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom* *United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1<sup>st</sup> Cir. 1993) (stating that public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”). The Commission and DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission’s review differ from those of DOJ. See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42. DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce. 15 U.S.C. § 18.

determining whether the transfer and assignment of licenses serves the broader public interest,<sup>78</sup> we take into account factors beyond those considered under a traditional antitrust analysis. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.<sup>79</sup> In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.<sup>80</sup> We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another.<sup>81</sup> For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.<sup>82</sup>

17. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>83</sup> Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.<sup>84</sup> Similarly, section

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<sup>78</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 12-13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>79</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>80</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>81</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>82</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>83</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43 (conditioning approval on the divestiture of operating units in select markets). See also *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (conditioning approval on the divestiture of MCI's Internet assets); Applications of VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779 (2001) ("*Deutsche Telekom-VoiceStream Wireless Order*") (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

<sup>84</sup> 47 U.S.C. § 303(r). See also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *SBC-AT&T Order*, 20 FCC Rcd at 18302-03 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) (continued...))

214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”<sup>85</sup> Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to impose and enforce conditions to ensure that the transaction will, overall, serve the public interest.<sup>86</sup> Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes.<sup>87</sup> Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.<sup>88</sup>

#### IV. COMPETITIVE ANALYSIS

18. In assessing the competitive effects of this transaction, we utilize the same analytical framework we recently have used in other transactions resulting in horizontal concentration in mobile telephony markets.<sup>89</sup> In particular, our analysis is the same with respect to: (1) product and geographic market definition,<sup>90</sup> the identification of relevant spectrum,<sup>91</sup> and the identification of market

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powers permit Commission to order cable company not to carry broadcast signal beyond station’s primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

<sup>85</sup> 47 U.S.C. § 214(c). See also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 13-14 ¶ 20; *SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

<sup>86</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 14 ¶ 20; *SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7<sup>th</sup> Cir. 1992) (discussing Commission’s authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

<sup>87</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 14 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>88</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 14 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>89</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 14-36 ¶¶ 21-97; *Sprint-Nextel Order*, 20 FCC Rcd at 13981-14011 ¶¶ 30-122; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066-90, 13094-13100 ¶¶ 22-98, 110-131; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21552-86, 21584-99 ¶¶ 57-164, 184-200.

<sup>90</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 16-18 ¶¶ 26-31; *Sprint-Nextel Order*, 20 FCC Rcd at 13983-91 ¶¶ 37-57; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067-70 ¶¶ 25-36; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557-63 ¶¶ 71-91.

<sup>91</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 18 ¶ 31; *Sprint-Nextel Order*, 20 FCC Rcd at 13982, 13992-93 ¶¶ 34, 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-61 ¶ 81.

participants;<sup>92</sup> (2) the application of our initial screen to identify markets of possible competitive concern,<sup>93</sup> (3) the general analysis of the likelihood of unilateral effects and coordinated interaction,<sup>94</sup> and (4) the market-specific evaluation of possible competitive harm.<sup>95</sup> The parties here do not challenge this analytical framework or the general conclusions about competition in mobile telephony markets we have previously reached based on it.

### A. Market Definition

19. *Product market.* We adopt the same product market definition as applied by the Commission in recent transactions involving the mobile telephone market. In those orders, the Commission found that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services.<sup>96</sup> Nevertheless, it analyzed all of these product markets under the combined market for mobile telephony service.<sup>97</sup> Based on consideration of various factors, including the nature of these services and their relationship with each other, the Commission found that this approach provided a reasonable assessment of any potential competitive harm resulting from the transactions under review.<sup>98</sup> Neither the Applicants nor the Petitioner challenged this product market definition in their submissions. Accordingly, we will use the same product market definition in this analysis.

20. *Geographic Market.* In recent mobile telephony transactions, the Commission applied the “hypothetical monopolist test” and found that the relevant geographic markets are local, are larger than counties, may encompass multiple counties and, depending on the consumer’s location, may even include

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<sup>92</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19 ¶¶ 32-33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991-92 ¶¶ 58-60; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 37-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563-64 ¶¶ 91-94.

<sup>93</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 20-24 ¶¶ 34-43; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-95 ¶¶ 62-67; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071-75 ¶¶ 40-51; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21564-69 ¶¶ 95-112.

<sup>94</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 24-30 ¶¶ 44-62; *Sprint-Nextel Order*, 20 FCC Rcd at 13995-14009 ¶¶ 68-116; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075-87 ¶¶ 52-93; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21569-86 ¶¶ 113-164.

<sup>95</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 30-36 ¶¶ 63-97; *Sprint-Nextel Order*, 20 FCC Rcd at 14009-11 ¶¶ 117-22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13094-100 ¶¶ 110-31; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21593-99 ¶¶ 184-200.

<sup>96</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 16 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 28; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

<sup>97</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 16 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 29; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557 ¶ 74.

<sup>98</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 16 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068-69 ¶¶ 29-30; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21559-60 ¶¶ 77, 79.

parts of more than one state.<sup>99</sup> The Commission in these orders identified two sets of geographic areas that may be used to define local markets—Component Economic Areas (“CEAs”) and Cellular Market Areas (“CMAs”).<sup>100</sup> Neither the Applicants nor the Petitioner challenged this product market definition in their submissions. Accordingly, we will use the same geographic market definition in this analysis.

21. *Input market for spectrum.* In the *ALLTEL-Midwest Wireless Order*, *Sprint-Nextel Order*, *ALLTEL-Western Wireless Order*, and *Cingular-AT&T Wireless Order*, the Commission evaluated whether spectrum is within the input market for mobile telephony service by examining its suitability for mobile voice service, its physical properties, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony.<sup>101</sup> We find that the input market currently includes cellular, PCS, and Specialized Mobile Radio (“SMR”) spectrum<sup>102</sup> and currently totals approximately 200 MHz of spectrum.<sup>103</sup>

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<sup>99</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 17-18 ¶¶ 29-30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 89-90.

<sup>100</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 17 ¶ 29; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 57; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072-73 ¶¶ 44-45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶¶ 104-105.

<sup>101</sup> See *ALLTEL-Midwest Wireless Order*, FCC -6-146, at 18 ¶ 31; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-61 ¶ 81.

<sup>102</sup> We find, consistent with previous Commission determinations, that Broadband Radio Service/Educational Broadband Service (“BRS/EBS”) 2.5 GHz spectrum is not currently part of the input market for mobile telephony service. Currently, this spectrum is committed to uses other than mobile telephony. See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 18 n.129; *Sprint-Nextel Order*, 20 FCC Rcd at 13992-93 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 10371 n.127; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 n.283. We note that this spectrum is currently subject to rebanding requirements, which will alter the bandwidth held by Sprint Nextel and which will be made available to the market. This will result in less available total bandwidth, but will provide more contiguous spectrum suitable for the provision of advanced mobile services, which may include mobile telephony services. Subsequent to the adoption of the *Cingular-AT&T Wireless Order*, Congress adopted the Commercial Spectrum Enhancement Act, Public Law No. 108-494 (2004), enabling the Commission to announce its intent to auction Advanced Wireless Services (“AWS”) licenses as early as June 2006. See FCC to Commence Spectrum Auction that Will Provide American Consumers New Wireless Broadband Services, *News Release* (rel. Dec. 29, 2004). This auction, Auction No. 66, closed on September 18, 2006. See FCC’s Advanced Wireless Services (AWS) Spectrum Auction Concludes, *News Release* (rel. Sept. 18, 2006). In the auction, a total of 104 bidders won 1,087 licenses. *Id.*; Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66, *Public Notice*, Report No. AUC-06-66-F (Auction No. 66), DA 06-1882 (rel. Sept. 20, 2006) (“*Auction No. 66 Public Notice*”).

<sup>103</sup> The approximately 200 MHz of spectrum includes 50 MHz for cellular services, 120 MHz for Broadband PCS, and additional spectrum for SMR. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 06-17, *Eleventh Report*, FCC 06-142, at ¶¶ 62-64 (rel. Sept. 29, 2006) (“*Eleventh Competition Report*”). See also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19 n.130; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 n.155; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 ¶ 81.

22. *Market participants.* In the *ALLTEL-Midwest Wireless Order*; *Sprint-Nextel Order*, *ALLTEL-Western Wireless Order*, and *Cingular-AT&T Wireless Order*, the Commission limited its analysis to cellular, PCS, and SMR facilities-based carriers, and excluded satellite carriers, wireless VoIP providers, MVNOs, and resellers from consideration when computing initial measures of market concentration.<sup>104</sup> Neither the Applicants nor the Petitioner challenged this market participant definition in their submissions. Accordingly, we will use the same market participant definition in this analysis.

## B. Data and Initial Screen

23. In evaluating this transaction, we applied the same criteria the Commission has used in prior mobile telephony transaction orders to identify markets likely to be adversely affected.<sup>105</sup> We examined the impact of the proposed transaction on subscriber concentration measures as well as the concentration of spectrum holdings in each geographic market. In previous transactions, we examined a market further if the post-transaction Herfindahl-Hirschman Index (“HHI”)<sup>106</sup> would be greater than 2800 and the change in HHI would be 100 or greater; or if the change in HHI would be 250 or greater regardless of the level of the HHI;<sup>107</sup> or if, post-transaction, the Applicants would have a 10 percent or greater interest in 70 MHz

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<sup>104</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is currently significantly higher than for services offered by cellular, PCS, or SMR carriers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. See Global Com, Iridium Satellite Phone Service Plans, at [http://www.globalcomsatphone.com/satellite/services/iridium\\_service\\_plans.html](http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html) (last visited Sept. 29, 2006); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalcomsatphone.com/satellite/services/globalstar.html/> (last visited Oct. 12, 2006). See also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. We also do not consider wireless VoIP carriers as providing the same functionality as mobile telephony providers because the service they provide now is nomadic rather than mobile. See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. Wireless VoIP services are nomadic in the sense that one can use them from a number of different locations (for example, by using a laptop at different internet cafes all over a town). *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19-20 n.134; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 n.151. VoIP using mobile phones is not anticipated to be available until sometime in 2007. See, e.g., John Blau, *Mobile VoIP not here until 2007*, TECHWORLD, March 13, 2006, available at <http://www.techworld.com/mobility/news/index.cfm?NewsID=5553> (last visited Oct. 12, 2006). See also *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 19-20 n.134.

<sup>105</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 20 ¶ 34; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶¶ 63-65; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071-74 ¶¶ 40-49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.

<sup>106</sup> Market concentration is generally measured by the “HHI,” and changes in concentration are measured by the change in the HHI. See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 15 ¶ 23; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 31; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 69.

<sup>107</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 21 ¶ 36; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 63; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 46; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

or more of cellular, PCS, and SMR spectrum.<sup>108</sup> For this transaction, our initial screen criteria results in only one market, Guam CMA, requiring an in-depth analysis.

24. In order to identify those areas that require further examination, we collected subscriber data from the mobile telephony carriers in Guam and the CNMI.<sup>109</sup> We then used this subscriber data to estimate market concentration levels and market shares for both the Guam and CNMI CMAs.<sup>110</sup> Based on the carrier subscriber data, we found that the post-transaction market shares for the merged entity in these markets would be [Redacted] percent in Guam and [Redacted] percent in the CNMI. Further, for Guam, the subscriber data shows a post-transaction HHI of [Redacted] with a change in the HHI of [Redacted]. For the CNMI, the subscriber data shows a post-transaction HHI of [Redacted] with a change in the HHI of [Redacted]. Therefore, application of our subscriber-based initial screen to this data shows that only the Guam CMA requires a more in-depth analysis to determine likely competitive effects. Also, the application of our spectrum aggregation initial screen did not result in additional markets being targeted for in-depth analysis.<sup>111</sup>

### C. Market-Specific Evaluation

25. As noted above, application of our initial screen identified the Guam CMA as requiring additional analysis to determine whether the proposed transaction would result in competitive harm. This section examines how the transaction could affect competitive behavior in the Guam CMA. As discussed in the *ALLTEL-Midwest Wireless Order*, *Sprint-Nextel Order*, *ALLTEL-Western Wireless Order*, and *Cingular-AT&T Wireless Order*, competition may be harmed either through unilateral actions<sup>112</sup> by the merged entity or through coordinated interaction<sup>113</sup> among firms competing in the relevant market.

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<sup>108</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 22 ¶ 39; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶¶ 63, 65; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106, 109.

<sup>109</sup> See *supra* note 58 and accompanying text (discussing the Third-Party Information Requests).

<sup>110</sup> Although in recent transactions we have analyzed market concentration levels and market shares using both CMAs and Component Economic Areas (CEAs), we have used only CMAs in the Proposed Transaction because the CMAs and CEAs for Guam and the CNMI reflect identical geographic areas. See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 21 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 105.

<sup>111</sup> See *supra* ¶ 23.

<sup>112</sup> Unilateral effects are those that result when a merged firm finds it profitable to alter its behavior by increasing prices or reducing output. *DOJ/FTC Horizontal Merger Guidelines* § 2.2. See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 25 ¶ 47; *Sprint-Nextel Order*, 20 FCC Rcd at 14001 n.199; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13076 n.155; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570 n.341.

<sup>113</sup> Coordinated interaction consists of actions by a group of firms that are profitable for each of the firms involved only because the other firms react by accommodating these actions rather than attempting to undercut them. See *DOJ/FTC Horizontal Merger Guidelines* § 2.1; *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 29 ¶ 60; *Sprint-Nextel Order*, 20 FCC Rcd at 13995 n.167; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13085 n.211; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21580 ¶ 151.

26. In this order, we find that extended qualitative discussions of unilateral effects and coordinated interaction are unnecessary.<sup>114</sup> First, many aspects of our previous analyses in the *ALLTEL-Midwest Wireless Order*, *Sprint-Nextel Order*, *ALLTEL-Western Wireless Order*, and *Cingular-AT&T Wireless Order* are unchallenged here.<sup>115</sup> Second, because only one local area requires in-depth analysis, it is feasible to turn directly to a market-specific discussion of this CMA and discuss the likelihood of both unilateral effects and coordinated interaction that may occur in this market as a result of the proposed transaction. As further explained below, our in-depth, market-specific analysis finds that there is no significant likelihood of harm from either unilateral effects or coordinated interaction in Guam as a result of this transaction. In particular, we find that there are sufficient current and potential rival mobile telephony operators with sufficient spectrum and comparable coverage to deter unilateral price increases or output reductions by the merged entity after this transaction.

27. DoCoMo is ultimately acquiring both Guam Cellular and Guam Wireless. TeleGuam claims that the combined entity will have a 55 to 65 percent market share in the Guam market.<sup>116</sup> The Applicants argue that TeleGuam's claim regarding the merged entity's market share is unsupported by any evidence or analysis, and therefore should not be considered by the Commission.<sup>117</sup> Further, the Applicants argue

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<sup>114</sup> In a number of the Commission's recent mobile telephony transaction orders, the initial screen typically identified large numbers of local areas as requiring in-depth analysis. For example, in the *Cingular-AT&T Wireless* merger, 270 CMAs were caught by the screen; when the screen was applied to CEAs, 180 such regions were caught. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21569 ¶ 110. The *Sprint-Nextel* screen caught 190 CMAs and 124 CEAs. See *Sprint-Nextel Order*, 20 FCC Rcd at 13994 ¶ 63. Finally, the *ALLTEL-Western Wireless* screen caught 19 CMAs and 11 CEAs. See *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 50. These large numbers meant that it was impractical to set out in an order a discussion of each local market; however, such an extended exposition was also unnecessary. The Commission proceeded by examining under what circumstances competitive harm—in the form of either coordinated interaction or unilateral effects—would be likely in local mobile telephony markets. This in-depth, qualitative analysis yielded criteria for determining whether harm is likely that were applicable to all the markets caught by the screen, which were then applied to individual markets. See *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 25-30 ¶¶ 47-62; *Sprint Nextel Order*, 20 FCC Rcd at 13995-14009 ¶¶ 68-116; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075-87 ¶¶ 54-93; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570-86 ¶¶ 115-164. Market-specific discussion was primarily confined to those markets for which the Commission concluded that harm was likely, and was contained in confidential appendices.

<sup>115</sup> For unilateral effects, the unchallenged aspects include: (1) product differentiation and substitutability (see *Sprint-Nextel Order*, 20 FCC Rcd at 14002-07 ¶¶ 94-107; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13077-79 ¶¶ 59-64; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21571-75 ¶¶ 119-133); (2) network effects (see *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13082-83 ¶¶ 75-77; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21578 ¶¶ 142-145); and (3) marginal cost reductions (see *Sprint-Nextel Order*, 20 FCC Rcd at 14009 ¶ 115). For coordinated interaction, the unchallenged aspects include: (1) firm and product homogeneity (see *Sprint-Nextel Order*, 20 FCC Rcd at 13997 ¶¶ 75-78; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13087 ¶ 90; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21582-84 ¶¶ 156-159); (2) existing cooperative ventures (see *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21585 ¶ 163); (3) number of firms (see *Sprint-Nextel Order*, 20 FCC Rcd at 13996 ¶¶ 71-72); (4) technology development (see *Sprint-Nextel Order*, 20 FCC Rcd at 13998-99 ¶¶ 81-83); (5) response of rivals (see *Sprint-Nextel Order*, 20 FCC Rcd at 13999-14000 ¶¶ 84-88); (6) transparency of information (see *Sprint-Nextel Order*, 20 FCC Rcd at 13996 ¶¶ 73-74; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13086 ¶ 89; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21581-82 ¶¶ 154-155); and (7) presence of mavericks (see *Sprint-Nextel Order*, 20 FCC Rcd at 13997-98 ¶¶ 79-80; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13087 ¶¶ 91-92; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21584-85 ¶¶ 160-162).

<sup>116</sup> Petition to Deny at 2. TeleGuam does not provide any underlying support for this assertion.

<sup>117</sup> See Opposition at 9.

that TeleGuam provides no evidence to show that the merged entity will have the incentive or the ability to raise prices, restrict output, or prevent competitors from obtaining access to additional spectrum.<sup>118</sup>

28. TeleGuam also claims that the proposed transaction will enable DoCoMo to act anticompetitively in Guam by introducing several advanced services, such as mobile banking, ticket purchasing, travel information, and remote learning, while not permitting other Guam carriers to provide these services.<sup>119</sup> TeleGuam requests that the Commission impose conditions to require DoCoMo to license its voice and data services and features to all other Guam carriers.<sup>120</sup> The Applicants argue that TeleGuam's request for licensing DoCoMo's voice and data services and features to all other Guam carriers would discourage innovation and eventually will deny consumers lower prices and better, advanced services.<sup>121</sup> The Applicants further argue that the Guam mobile telephony market is competitive with four to six well-capitalized, facilities-based carriers offering competitive services.<sup>122</sup> The Applicants assert that this level of competition is unlikely to present opportunities for the merged entity or any other Guam wireless carrier to act anticompetitively.<sup>123</sup>

29. Guam is an unincorporated United States territory located in the North Pacific Ocean.<sup>124</sup> Guam has a population of about 154,805,<sup>125</sup> and a population density of approximately 730 POPs/sq.mile.<sup>126</sup> Guam Cellular and Guam Wireless operate CDMA and GSM networks in Guam, respectively. Based on the carrier subscriber data, Guam Cellular and Guam Wireless currently have [Redacted] percent and [Redacted] percent of the mobile telephony subscriber market share in Guam, respectively. Combined, we find that these two entities would have a post-merger market share of [Redacted] percent.<sup>127</sup> Guam Cellular and Guam Wireless hold Cellular A-block (25 MHz) and PCS B-block (30 MHz) spectrum licenses, respectively. Throughout the Guam CMA, the merged entity would hold a total of 55 MHz of spectrum.

30. There are several other entities holding cellular, PCS, and SMR licenses in Guam. Pulse Mobile, LLC, a wholly-owned subsidiary of TeleGuam,<sup>128</sup> currently has an [Redacted] percent market

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<sup>118</sup> *See id.*

<sup>119</sup> *See* Petition to Deny at 9.

<sup>120</sup> *See id.*

<sup>121</sup> *See* Opposition at 22-23.

<sup>122</sup> *See* Application, Attachment, at 27-30; *see also* Opposition at 6.

<sup>123</sup> *See* Application, Attachment, at 27-30; *see also* Opposition at 6.

<sup>124</sup> Guam is approximately 6,000 miles west of San Francisco. *See* <http://ns.gov.gu/> (last visited Oct. 11, 2006).

<sup>125</sup> Population figure is based on 2000 Census data. *See* U.S. Census Bureau, American FactFinder, [http://factfinder.census.gov/servlet/DTGeoSearchByListServlet?ds\\_name=DEC\\_2000\\_IAGU&\\_lang=en&\\_ts=179422615804](http://factfinder.census.gov/servlet/DTGeoSearchByListServlet?ds_name=DEC_2000_IAGU&_lang=en&_ts=179422615804) (last visited Oct. 20, 2006). The geographic area information is from the official Guam government website. *See* <http://ns.gov.gu/geography.html> (last visited Oct. 11, 2006).

<sup>126</sup> POPs is an industry term referring to population, usually the number of people covered by a given wireless license or footprint. One "POP" equals one person. *See Eleventh Competition Report*, FCC 06-142, at n.29.

<sup>127</sup> TeleGuam also provided its own estimate of 55 to 65 percent market share for the merged entity. *See* Petition to Deny at 2.

<sup>128</sup> Petition to Deny at 2.

share and holds the B-block cellular (25 MHz) and E-block (10 MHz) PCS licenses. It operates both Time Division Multiple Access (“TDMA”) and GSM networks in Guam, and its coverage area in Guam is [Redacted].<sup>129</sup> IT&E Overseas, Inc. (“ITE”) currently has a [Redacted] percent market share and holds the C-block PCS (30 MHz) and D-block PCS (10 MHz) licenses. IT&E provides service on a CDMA network in Guam and [Redacted].<sup>130</sup> IT&E’s CDMA coverage is [Redacted].<sup>131</sup> Choice Phone LLC currently has an [Redacted] percent market share, holds SMR licenses and operates an iDEN network<sup>132</sup> in Guam, and its current coverage area in Guam [Redacted].<sup>133</sup> Bell Atlantic New Zealand Holdings, Inc. (“BANZHI”) holds the A-block PCS (30 MHz) license,<sup>134</sup> Wave Runner LCC (“Wave Runner”) holds the F-block PCS (10 MHz) license, and Nextel License Holdings 4, Inc. (“Nextel”), a wholly-owned subsidiary of Sprint Nextel, holds SMR licenses. Currently, BANZHI and Wave Runner [Redacted].<sup>135</sup> Using its spectrum in Guam, Nextel [Redacted].<sup>136</sup> The pre- and post-transaction HHIs for Guam are [Redacted] and [Redacted], respectively, and the change in the HHI is [Redacted].

31. As explained below, we find that, even in light of the change in the HHI, this transaction is unlikely to result in significant competitive harm in the Guam CMA. Even though, post-transaction, the merged entity would have a combined market share of [Redacted] percent, there would be three other competitors, IT&E, Pulse Mobile, and Choice Phone, with spectrum holdings and network coverage that would likely be sufficient to limit the ability and incentive of the combined entity to raise prices unilaterally, reduce service quality, or restrict output. Further, we conclude from our analysis of the various factors we have considered in recent mobile telephony transactions that this transaction is unlikely to alter conditions in Guam in such a way as to make coordinated interaction more likely, more successful, or more complete. Post-transaction, four mobile telephony providers will remain in the Guam CMA, and each carrier has spectrum holdings and network coverage sufficient to continue to compete vigorously in the provision of mobile telephony services.

32. Finally, regarding TeleGuam’s argument that DoCoMo’s ability to introduce advanced services would be harmful to competition, we have previously found that a firm gaining certain competitive advantages by distinguishing itself in the marketplace, such as by offering new services or

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<sup>129</sup> See generally Pulse Mobile Response.

<sup>130</sup> See IT&E Wireless, <http://www.itepcs.net/> (last visited Nov. 9, 2006); IT&E Help Center, About PCS, <http://www.ite.net/help/wireless/about.php#pcs> (last visited Nov. 9, 2006); see generally IT&E Response.

<sup>131</sup> See generally IT&E Response.

<sup>132</sup> See Telephone Number Portability, CC Docket No. 95-116, *Order*, 20 FCC Rcd 16323, 16325 ¶ 7 (Spectrum & Comp. Pol. Div., Wireless Telecomm. Bureau 2005). Integrated Digital Enhanced Network (“iDEN”) is a technology provided to mobile telephony carriers by Motorola, Inc. See *Sprint-Nextel Order*, 20 FCC Rcd at 13970 ¶ 5.

<sup>133</sup> Choice Phone Response at Attachment.

<sup>134</sup> The Commission has recently consented to the assignment of the PCS A-Block license, covering both the Guam and CNMI CMAs, from BANZHI to PTI Pacifica Inc. See Application of Bell Atlantic New Zealand Holdings, Inc., Assignor, and GTE Pacifica, Inc., Assignee, for the Assignment of Personal Communications Service License WQCV808 (MTA 050), File No. 0002401623, *Order*, DA 06-2197 (rel. Oct. 27, 2006).

<sup>135</sup> Wave Runner Response at Attachment. Wave Runner plans to start a GSM network sometime in 2006. See [http://www.gsmworld.com/roaming/gsminfo/net\\_guwg.shtml](http://www.gsmworld.com/roaming/gsminfo/net_guwg.shtml) (last visited Oct. 27, 2006).

<sup>136</sup> Nextel Response at 2.

products, has not necessarily engaged in or will engage in anticompetitive behavior. The development of unique competitive advantages is the essence of the competitive process.<sup>137</sup> The introduction of new services and products to Guam may result in the combined entity having a competitive advantage over other mobile telephony providers in Guam. These new services, however, may benefit consumers, and other mobile telephony carriers in Guam are free to develop their own innovative products and services. Therefore, we deny TeleGuam's request to condition this transaction on requiring DoCoMo to license its voice and data services and features to all other Guam carriers.

## D. Roaming

### 1. Background

33. Roaming occurs when the subscriber of one CMRS provider travels beyond the service area of that provider and utilizes the facilities of another CMRS provider to place an outgoing call, to receive an incoming call, or to continue an in-progress call.<sup>138</sup> Section 20.12 of the Commission's rules imposes on CMRS providers the obligation to provide manual roaming arrangements to the subscriber of another provider on request.<sup>139</sup> We note that the Commission is currently reviewing whether roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market.<sup>140</sup>

34. CDG argues that, given the "crucial military importance" of Guam, it is "critical that visitors to the region have reasonable access to roaming services for their CDMA-based wireless services."<sup>141</sup> CDG states that it filed comments in the proceeding to "highlight the nexus between national security issues and reasonable access to roaming for CDMA users."<sup>142</sup> CDG expresses concern that the Applicants did not address (in their original applications) their specific plans for the CDMA network operated by

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<sup>137</sup> See Applications of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9837-38 ¶ 105 (2001) ("*Deutsche Telekom-VoiceStream Wireless Order*").

<sup>138</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 36 ¶ 98; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13090 ¶ 101; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21586 ¶ 166; see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Service, WT Docket No. 05-265, 00-193, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) ("*Roaming Notice*").

<sup>139</sup> 47 C.F.R. § 20.12(c) provides:

Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

<sup>140</sup> See *Roaming Notice*, 20 FCC Rcd at 15055 ¶¶ 18-19.

<sup>141</sup> Comments of CDG at 2-3. CDG is a "non-profit, international consortium of over 110 companies, including the world's leading operators and manufacturers" of services and systems based on CDMA technologies. *Id.* at 1.

<sup>142</sup> *Id.* at 2-3.

Guam Cellular.<sup>143</sup> In response, the Applicants state that DoCoMo currently expects to continue operating two separate networks (GSM and CDMA) in Guam and the CNMI, and expects no significant subscriber transition issues in the near term.<sup>144</sup> The Applicants also state that they intend to deploy a W-CDMA network on the excess capacity of Guam Cellular's existing 850 MHz network and will also continue to provide CDMA service as the marketplace demands.<sup>145</sup>

35. TeleGuam also argues that the Proposed Transaction raises "international roaming" concerns. TeleGuam states that Guam wireless carriers derive significant revenues from international roaming by tourists from nearby countries such as Japan and Korea.<sup>146</sup> It argues that the Commission should require DoCoMo to enter into reasonable, reciprocal "plastic roaming" agreements at reasonable rates and at reasonable and non-discriminatory terms and conditions with Guam carriers.<sup>147</sup> In addition, it also asks the Commission to require DoCoMo to make available to Guam carriers the dual-mode handsets (which DoCoMo offers its customers in Japan) at reasonable rates and at reasonable and non-discriminatory terms and conditions.<sup>148</sup> In response, the Applicants state that DoCoMo is receptive to establishing roaming partnerships with other local operators and entered into a roaming agreement with Pulse Mobile, TeleGuam's wireless subsidiary, on June 21, 2006, shortly after TeleGuam's Petition to Deny was filed.<sup>149</sup> The Applicants state that the agreement allows Pulse Mobile's customers to roam in Japan and is substantially similar to DoCoMo's agreement with Guam Wireless.<sup>150</sup> In terms of DoCoMo's customers roaming in Guam, the Applicants state that the dual-mode handsets are currently customized for Japanese subscribers to operate on DoCoMo's 2 GHz W-CDMA network.

## 2. Discussion

36. In evaluating the impact of the Proposed Transaction on roaming services, we focus on the potential harm to consumers of mobile telephony services and conclude that the Proposed Transaction will not adversely affect the availability of roaming services in Guam or in the CNMI. First, the transaction will not reduce the number of CDMA operators in either Guam or the CNMI in the near term. Second, local and domestic CDMA customers will continue to have access to other CDMA operators in Guam and the CNMI since IT&E Overseas and PTI Pacifica operate CDMA networks in Guam and the

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<sup>143</sup> *Id.* (stating that there is "intrinsic value" in maintaining a CDMA network in Guam and in the CNMI, particularly in order to ensure roaming access for visitors from the mainland United States and other countries, such as Japan and South Korea).

<sup>144</sup> Application, Attachment, at 36.

<sup>145</sup> Response to WTB Information Request at 2.

<sup>146</sup> Petition to Deny at 6.

<sup>147</sup> TeleGuam describes a "plastic roaming" arrangement in which the Japanese customer removes the SIM card out of his or her handset and puts it in a GSM handset in Guam. Petition to Deny at 8.

<sup>148</sup> *Id.*

<sup>149</sup> Response to WTB Information Request at 7-8. The Applicants also state that there currently are two other rival wireless operators, KDDI and Softbank Mobile (formerly Vodafone K.K.), and two other potential wireless operators, eAccess Ltd and IPMobile Inc., that are expected to launch service in Japan between the Fall of 2006 and Spring of 2007. See Application, Attachment, at 14-15.

<sup>150</sup> Opposition at 21.

CNMI, respectively.<sup>151</sup> Finally, local and domestic CDMA customers can also use dual-mode CDMA/GSM handsets<sup>152</sup> to roam in Guam and the CNMI using the local GSM networks.

37. We also note that, with respect to TeleGuam's request that the Commission should require DoCoMo to enter into reasonable, reciprocal "plastic roaming" agreements at reasonable rates and at reasonable and non-discriminatory terms and conditions with Guam carriers, the record shows that DoCoMo has now entered into roaming agreements with both Guam Wireless and Pulse Mobile, TeleGuam's subsidiary, the only two GSM operators in Guam. In terms of TeleGuam's arguments to require "DoCoMo to make available to Guam carriers its dual-mode handset,"<sup>153</sup> this concern appears to be more appropriately directed to the manufacturer(s) of such handsets.

38. Accordingly, we conclude that the Proposed Transaction will not adversely affect the availability of roaming services in Guam or in the CNMI and decline to impose any conditions on the Proposed Transaction regarding roaming services.

### **E. Public Interest Benefits**

39. In addition to assessing the potential competitive harms of the Proposed Transaction, we also consider whether the respective combination of these companies' wireless operations is likely to generate verifiable, merger-specific public interest benefits.<sup>154</sup> In doing so, we ask whether the resulting combined entity would be able, and would be likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the combination.<sup>155</sup>

40. As discussed below, we find that the Proposed Transaction is likely to result in certain merger-specific public interest benefits. We reach this conclusion recognizing that many of these benefits may be challenging to achieve in the near future because of sizable technological and financial requirements. As a result, it is difficult for us to precisely quantify either the magnitude of or the time period in which these benefits will be realized.

#### **1. Analytical Framework**

41. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and

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<sup>151</sup> See also *infra* Section VII (National Security, Law Enforcement, Foreign Policy and Trade Concerns) (concluding that adoption of network security condition sought by the Executive Branch Entities addresses CDG's concerns).

<sup>152</sup> There are dual-mode or worldmode handsets available in the market place. See CDG's website at <http://www.cdg.org/technology/roaming/worldmode.asp>.

<sup>153</sup> Petition to Deny at 8.

<sup>154</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 39 ¶ 105; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 193; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

<sup>155</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 39 ¶ 105; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 193; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

therefore result in lower prices, improved quality, enhanced service or new products.”<sup>156</sup> Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms.<sup>157</sup>

42. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>158</sup> Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude.<sup>159</sup> In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>160</sup> Furthermore, as the Commission has previously explained, “benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than

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<sup>156</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 39 ¶ 107; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 183; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 194; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>157</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 39 ¶ 107; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 183; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 194; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204.

<sup>158</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 39 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599-600 ¶ 205; accord *Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee)*, CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd 20559, 20630 ¶ 189 (2002) (“*EchoStar-DirecTV HDO*”); *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20063-64 ¶ 158 (“Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14825 ¶ 255 (“Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger . . .”). Cf. *DOJ/FTC Merger Guidelines* § 4.

<sup>159</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18384-85 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

<sup>160</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18530-31 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

predictions about events that are expected to occur closer to the present.”<sup>161</sup> Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.”<sup>162</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>163</sup>

43. Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>164</sup> Under this sliding scale approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>165</sup> On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the transaction.<sup>166</sup>

## 2. Discussion

44. The Applicants and commenters state that the proposed transaction would serve the public interest, because DoCoMo’s financial strength, technological expertise, and innovation would “deliver substantial pro-competitive benefits”<sup>167</sup> to wireless consumers in Guam and the CNMI.<sup>168</sup> Specifically, the Applicants maintain that the combined entity would achieve economies of scale and scope allowing the merged company to more effectively compete against other wireless carriers.<sup>169</sup> The Applicants also

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<sup>161</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190).

<sup>162</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205. See also *DOJ/FTC Merger Guidelines* § 4.

<sup>163</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>164</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 109; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 185; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 196; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206.

<sup>165</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 109; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 185; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 196; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206. Cf. *DOJ/FTC Merger Guidelines* § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

<sup>166</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146, at 40 ¶ 109; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 185; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 195.

<sup>167</sup> Application, Attachment, at i.

<sup>168</sup> *Id.* at i, 24, 31, 35; Comments of CNMI Governor at 1; Comments of Guam Governor at 1.

<sup>169</sup> Application, Attachment, at 4.

contend that the merger would allow the combined entity to provide higher quality service and would enable the combined entity to deploy advanced wireless services and technologies more rapidly than either existing company currently has or could achieve on its own.<sup>170</sup> Further, the Applicants argue that the proposed transaction would result in roaming benefits both within Guam and internationally.<sup>171</sup>

45. *Economies of Scale and Operating Synergies.* The Applicants state that the transaction will create significant economies of scale and scope and will improve Guam Cellular's ability to compete against other wireless operators in Guam and the CNMI.<sup>172</sup> The Applicants maintain that economies of scale and scope and operating synergies will be achieved by multiple means, including the consolidation of best practices, integration of operations, and reduced prices for equipment.<sup>173</sup>

46. The Applicants also allege that, as a result of improved economies of scale and scope in the long term, the proposed transaction will result in cost reductions and savings that could potentially result in service price reductions.<sup>174</sup> For example, by consolidating functions such as technological research, system development and marketing, the Applicants state that they would be able to lower associated costs and pass the savings on to consumers.<sup>175</sup> They also expect that the improved economies of scale and scope achieved through [Redacted].<sup>176</sup>

47. The Applicants also state that the combined company would be able to procure handsets and infrastructure equipment at lower prices.<sup>177</sup> The Applicants generally maintain that, "as equipment purchase volumes go up, equipment manufacturers are more willing to customize handsets and other device interfaces to match a carrier's service offerings."<sup>178</sup> Specifically, the Applicants assert that the combined company would be in a better position to deliver customized handsets and that the collective procurement of handsets and accessories will lead to reductions in handset costs.<sup>179</sup>

48. *Improvements in Service Quality.* The Applicants assert that the combined company will have the financial resources it needs to expand, upgrade, and strengthen the existing networks of Guam Cellular and Guam Wireless.<sup>180</sup> They assert that DoCoMo's capital and expertise in providing advanced wireless services in Japan will provide additional service- and network-related benefits to Guam and

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 32; Response to WTB Information Request at 7-8.

<sup>172</sup> Application, Attachment, at 24, 31.

<sup>173</sup> Response to WTB Information Request at 5-6; Application, Attachment, at 33.

<sup>174</sup> Application, Attachment, at 33. [Redacted]." Response to WTB Information Request at 5.

<sup>175</sup> Application, Attachment, at 33; Response to WTB Information Request at 5.

<sup>176</sup> Response to WTB Information Request at 5.

<sup>177</sup> Application, Attachment, at 33.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; Response to WTB Information Request at 5.

<sup>180</sup> Application, Attachment, at 24, 32 (stating that, although "each carrier has operated a successful business and offered a variety of wireless voice and data services to its customers with consistent quality and affordability," they have not had the resources to develop networks necessary to provide seamless coverage and a full array of advanced services throughout Guam and CNMI).

CNMI consumers.<sup>181</sup> DoCoMo states that it will enhance Guam Cellular's and Guam Wireless's existing operations, which will produce tangible benefits for consumers by increasing product choice, service quality (e.g., reduce the number of dropped calls and improve sound quality), and [Redacted].<sup>182</sup>

49. DoCoMo asserts that it will provide funds of approximately \$6.5 million to strengthen the merged company's facilities and infrastructure.<sup>183</sup> The Applicants state that [Redacted].<sup>184</sup> The Applicants expect that [Redacted].<sup>185</sup> After the transaction closes, DoCoMo states that [Redacted].<sup>186</sup>

50. The Applicants and a number of commenters assert that DoCoMo's investment, which will allow the combined company to make improvements to existing CDMA and GSM networks, will not only benefit Guam Cellular and Guam Wireless subscribers, but potentially all wireless subscribers in Guam and the CNMI,<sup>187</sup> because, as DoCoMo upgrades the Guam Cellular and Guam Wireless networks, the other service providers may correspondingly upgrade and improve their own networks and services.<sup>188</sup>

51. *Promotion of Next Generation Services.* The Applicants and a number of commenters state that the combined company will be able to deploy advanced wireless services throughout Guam and the CNMI far more quickly than Guam Cellular and Guam Wireless could without the capital, wireless experience, and management skills of DoCoMo.<sup>189</sup> The Applicants argue that the deployment of advanced wireless services will promote competition not only in the applicable wireless market, but also in the mass-market for high-speed data services, which are today provided over telephone lines through xDSL services or over cable lines through cable modems.<sup>190</sup> They assert that the combined company will provide customers with another technological choice for obtaining high-speed data services through a wireless connection.<sup>191</sup>

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<sup>181</sup> *Id.* at ii, 31, 32.

<sup>182</sup> *Id.* at ii, 3, 32; Response to WTB Information Request at 4. At this time, the Applicants have [Redacted]. Response to WTB Information Request at 1 (stating that DoCoMo [Redacted]).

<sup>183</sup> Application, Attachment, at 32; Response to WTB Information Request at 1.

<sup>184</sup> Response to WTB Information Request at 1.

<sup>185</sup> *Id.* (stating that [Redacted]).

<sup>186</sup> *Id.*

<sup>187</sup> Application, Attachment, at 35; Comments of Marianas Visitors Authority at 1; Comments of Guam Governor at 1; Comments of Commonwealth Telecommunications Commission at 1; Comments of CNMI Resident Representative at 1.

<sup>188</sup> Application, Attachment, at 35-36; Comments of Marianas Visitors Authority at 1; Comments of Commonwealth Telecommunications Commission at 1; Comments of CNMI Resident Representative at 1.

<sup>189</sup> Application, Attachment, at 31-32 (stating that DoCoMo's extensive experience with such features and its ongoing investment in research and development will facilitate the delivery of such services to Guam and the CNMI); Comments of CNMI Governor at 1; Comments of Guam Governor at 1.

<sup>190</sup> Application, Attachment, at 35.

<sup>191</sup> *Id.*

52. Post-transaction, the Applicants intend to deploy GPRS on Guam Wireless's current GSM PCS network, [Redacted].<sup>192</sup> The Applicants expect to launch W-CDMA service on Guam Cellular's [Redacted].<sup>193</sup> The Applicants assert that they [Redacted].<sup>194</sup> Additionally, the Applicants believe that [Redacted].<sup>195</sup> Using these upgraded networks, DoCoMo states that it plans on introducing features that are not currently offered in Guam or the CNMI, such as a wide variety of multimedia and data services, including video, games, mobile banking, ticket purchasing, travel information, and remote learning.<sup>196</sup> The Applicants also are considering using Guam Cellular's Lower Band 700 MHz and WCS licenses for wireless broadband applications,<sup>197</sup> which will allow Guam Cellular to offer an enhanced menu of new advanced wireless services, such as mobile broadband Internet.<sup>198</sup>

53. *Roaming.* The Applicants assert that, with DoCoMo's investment and improvements to the network, the combined entity would provide advanced services to roaming customers and expand the availability of global roaming capability for international travelers.<sup>199</sup> For example, through deployment of GPRS and W-CDMA services, [Redacted].<sup>200</sup> Specifically, the Applicants state that [Redacted].<sup>201</sup> Likewise, the Applicants state that, through the deployment of GPRS and W-CDMA services, [Redacted].<sup>202</sup> A number of commenters further assert that the Proposed Transaction will benefit the tourism industries, and ultimately the economies,<sup>203</sup> of Guam and the CNMI, because a strong

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<sup>192</sup> Response to WTB Information Request at 1.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1, 2.

<sup>195</sup> *Id.* However, the Applicants state that they "[Redacted]." *Id.* at 2.

<sup>196</sup> Application, Attachment, at 35; HafaTel Press Release at 1. Upon introduction of new technology and an upgraded network system that offers GPRS and W-CDMA, [Redacted]. The Applicants state that [Redacted]. Further, they state that [Redacted]. Response to WTB Information Request at 7.

<sup>197</sup> Application, Attachment, at 32. The Applicants state that they "[Redacted]." Response to WTB Information Request at 4.

<sup>198</sup> Application, Attachment, at 32.

<sup>199</sup> *Id.*

<sup>200</sup> Response to WTB Information Request at 7.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 6.

<sup>203</sup> The tourism industry is "the largest industry driving [the] economy" in Guam and the CNMI. Comments of CNMI Governor at 1; Comments of Guam Governor at 1. Commenters state that that the increased tourism will help the economies of Guam and the CNMI grow, and that the stronger economy brought on by increased tourism from Japan will ultimately benefit all of the citizens of Guam and the CNMI. Comments of CNMI Governor at 1; Comments of Guam Visitors Bureau at 1; Comments of Guam Governor at 1. Additionally, some commenters assert that the Proposed Transaction "will not only diversify investments, strengthen [CNMI] ties to one of Japan's leading corporations, but also provide a positive and confident signal for others to establish badly needed investments in our currently depressed economy." Comments of CNMI Resident Representative at 1.

telecommunications network and the roaming capability provided by DoCoMo's investment will enhance Guam's and the CNMI's attractiveness as a tourist destination.<sup>204</sup>

### 3. Conclusion

54. We find that it is likely that the proposed transaction would result in many of the transaction-specific public interest benefits discussed above. Specifically, in the Guam and CNMI markets, we find that it is likely that this transaction will result in many public interest benefits and would allow the combined entity to more effectively compete with other carriers.

## V. FOREIGN OWNERSHIP

55. The Applicants request a declaratory ruling that it would not serve the public interest to prohibit the 100 percent indirect foreign ownership of post-transaction Guam Cellular under section 310(b)(4) of the Act. The Applicants also request that the Commission authorize Guam Cellular to accept aggregate equity or voting interests of up to 25 percent from existing and new non-U.S. investors, in addition to their existing equity and voting interests, without seeking further Commission approval.<sup>205</sup> We examine the foreign ownership interests that will be held in Guam Cellular, through the 100 percent indirect ownership interest that DoCoMo would obtain as a result of this Proposed Transaction, pursuant to our public interest analysis under sections 310(b)(4) and 310(d) of the Act and the Commission's foreign ownership policies adopted in the *Foreign Participation Order*.<sup>206</sup> As part of that analysis, we consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the foreign investment.<sup>207</sup> Relying on Commission precedent, we find that the proposed transfer of control does not raise any issues under sections 310(a) and 310(b)(1)-(b)(3) of the Act.<sup>208</sup> Our analysis focuses

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<sup>204</sup> Comments of CNMI Governor at 1; Comments of Marianas Visitors Authority at 1; Comments of Guam Visitors Bureau at 1; Comments of Commonwealth Telecommunications Commission at 1; Comments of Guam Governor at 1. The majority of the visitors to Guam and CNMI come from Japan. Comments of CNMI Governor at 1 (stating that the CNMI had approximately 530,000 visitors last year, most from Japan); Comments of Marianas Visitors Authority at 1; Comments of Guam Governor at 1 (stating that Guam had 1.2 million visitors last year, the majority of which were from Japan) Visitors Bureau (stating that 80% of Guam's visitors come from Japan); Comments of Commonwealth Telecommunications Commission at 1 (stating that approximately two-thirds of CNMI's visitors come from Japan); Comments of CNMI Resident Representative at 1. For example, some commenters maintain that the tourist market "may be strengthened by improved wireless communications between the CNMI and Japan," Comments of CNMI Governor at 1, in part, because they "will feel more comfortable [in the CNMI] with access to many of the services they presently receive at home." Comments of Commonwealth Telecommunications Commission at 1.

<sup>205</sup> Application, Attachment, at 43.

<sup>206</sup> 47 U.S.C. § 310(b)(4), (d); see Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"), *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

<sup>207</sup> The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing foreign investment pursuant to sections 310(b)(4) and 310(d). *Foreign Participation Order*, 12 FCC Rcd at 23918-21 ¶¶ 59-66. See also *infra* Section VII (National Security, Law Enforcement, Foreign Policy, and Trade Concerns).

<sup>208</sup> Section 310(a) of the Act prohibits any radio license from being "granted to or held by" a foreign government or its representative. 47 U.S.C. § 310(a). In this case, no foreign government or its representative holds any of the radio licenses. Section 310(b)(1)-(2) of the Act prohibits common carrier, broadcast and aeronautical fixed or *en* (continued....)

on issues raised under section 310(b)(4). Based on the record before us, we conclude, for the reasons stated below, that it would not serve the public interest to deny consent to the proposed transaction because of the indirect foreign equity and voting interests that will be held in Guam Cellular through its parent DoCoMo Guam.

#### A. Legal Standard for Foreign Ownership of Radio Licenses

56. Section 310(b)(4) of the Act establishes a 25 percent benchmark for investment by foreign individuals, corporations, and governments in entities that control U.S. common carrier radio licensees. This section also grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.<sup>209</sup>

57. The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's direct or indirect parent.<sup>210</sup> The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark.<sup>211</sup> Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests.<sup>212</sup> The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark. Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the "public interest will be served by the refusal or revocation of such license."

58. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals or entities from World Trade Organization ("WTO") Member countries in U.S. common carrier and aeronautical fixed and en route radio licensees.<sup>213</sup> Therefore, with respect to indirect foreign investment from WTO Members, the Commission replaced its "effective competitive opportunities" test with a rebuttable presumption that such investment

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route radio licenses from being "granted to or held by" aliens, or their representatives, or foreign corporations. 47 U.S.C. § 310(b)(1)-(2). We find that no alien, representative, or foreign corporation holds any of the common carrier licenses in this case. Accordingly, we find that the proposed transaction is not inconsistent with the foreign ownership provisions of section 310(a) or 310(b)(1)-(2) of the Act. *See Deutsche Telekom-VoiceStream Wireless Order*, 16 FCC Rcd at 9804-9809 ¶¶ 38-48. Additionally, because the foreign investment in Guam Cellular is held through a controlling U.S. parent company, DoCoMo Guam, the proposed transaction does not trigger section 310(b)(3) of the Act, which places a 20% limit on alien, foreign corporate or foreign government ownership of entities that themselves hold common carrier, broadcast and aeronautical fixed or en route Title III licenses. *Compare* 47 U.S.C. § 310(b)(3) *with* § 310(b)(4). *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, *Declaratory Ruling*, 103 F.C.C. 2d 511 (1985) ("*Wilner & Scheiner P*"), *recon. in part*, 1 FCC Rcd 12 (1986).

<sup>209</sup> 47 U.S.C. § 310(b)(4).

<sup>210</sup> *See* BBC License Subsidiary L.P., *Memorandum Opinion and Order*, 10 FCC Rcd 10968, 10973 ¶ 22 (1995) ("*BBC License Subsidiary*").

<sup>211</sup> *See id.* at 10972, 10973-74 ¶¶ 20, 24-25.

<sup>212</sup> *See id.* at 10972, 10973 ¶¶ 20, 23.

<sup>213</sup> *Foreign Participation Order*, 12 FCC Rcd at 23896, 23913, 23940 ¶¶ 9, 50, 111-112.

generally raises no competitive concerns.<sup>214</sup> In evaluating an applicant's request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a "principal place of business" test to determine the nationality or "home market" of foreign investors.<sup>215</sup>

59. We begin our evaluation of Guam Cellular's indirect foreign ownership under section 310(b)(4) by calculating the foreign equity and voting interests in DoCoMo Guam, the proposed U.S. parent of Guam Cellular. We then determine whether these foreign interests properly are ascribed to individuals or entities that are citizens of, or have their principal places of business in, WTO Member countries.

60. In calculating attributable alien equity interests in a parent company, the Commission uses a multiplier to dilute the percentage of each investor's equity interest in the parent company when those interests are held through intervening companies. The multiplier is applied to each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.<sup>216</sup> By contrast, in calculating alien voting interests in a parent company, the multiplier is not applied to any link in the vertical ownership chain that constitutes a controlling interest in the company positioned in the next lower tier.<sup>217</sup>

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<sup>214</sup> *Id.* The Commission stated, in the *Foreign Participation Order*, that it will deny an application if it finds that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding. *See id.*, 12 FCC Rcd at 23946 ¶ 131.

<sup>215</sup> To determine a foreign entity's home market for purposes of the public interest determination under section 310(b)(4), the Commission will identify and balance the following factors: (1) the country of a foreign entity's incorporation, organization or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which the world headquarters is located; (4) the country in which the majority of the tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which the foreign entity derives the greatest sales and revenues from its operations. *Foreign Participation Order*, 12 FCC Rcd at 23941 ¶ 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order*, 11 FCC Rcd 3873, 3951 ¶ 207 (1995)). For examples of cases applying the five-factor "principal place of business" test, *see Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc., and Telenor Satellite, Inc., Assignee, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization*, 16 FCC Rcd 22897 (2001), *erratum*, 17 FCC Rcd 2147 (Int'l Bur. 2002), *recon. denied*, 17 FCC Rcd 14030 (2002); *Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, et al., Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (Int'l Bur. 2002).

<sup>216</sup> *See BBC License Subsidiary*, 10 FCC Rcd at 10973-74 ¶¶ 24-25.

<sup>217</sup> *See id.* at 10973 ¶ 23; *see also Wilner & Scheiner I*, 103 F.C.C. 2d at 522 ¶ 19. Thus, when evaluating foreign voting interests in the U.S. parent company of a common carrier licensee, it is possible that multiple investors will be treated as holding the same voting interest in a U.S. parent company where the investment is held through multiple intervening holding companies or partnerships. Our purpose in identifying the citizenship of the specific individuals or entities that hold these interests is not to increase the aggregate level of foreign investment, but rather to determine whether any particular interest that a foreign investor proposes to acquire raises potential risks to competition or other public interest concerns, such as national security or law enforcement concerns. *See Foreign Participation Order*, 12 FCC Rcd at 23940-41 ¶¶ 111-15.

## B. Attribution of Foreign Ownership Interests

61. As indicated in Section II.B above, Guam Cellular will be a direct wholly-owned subsidiary of DoCoMo Guam, a U.S. corporation that, in turn, is wholly owned by DoCoMo, a Japanese corporation.<sup>218</sup> DoCoMo itself is majority owned (approximately 62.15 percent) by NTT, a Japanese holding company.<sup>219</sup> The Japan Ministry of Finance holds approximately 38.53 percent of the issued and outstanding shares of NTT and, by Japanese law, two-thirds of NTT's shares must be held by Japanese citizens or entities.<sup>220</sup>

62. Based on the information and representations submitted by the Applicants, and consistent with the foreign ownership case precedent discussed in Section V.A, we calculate below the foreign equity and voting interests that will be held in DoCoMo Guam, directly or indirectly, by or through DoCoMo and NTT.

63. First, we find that DoCoMo directly will hold 100 percent of the equity and voting interests in DoCoMo Guam. Based on the information in the record, we find that DoCoMo's interests in DoCoMo Guam properly are ascribed to Japan, a WTO Member country.<sup>221</sup>

64. We next look at the foreign equity and voting interests that will be held indirectly in DoCoMo Guam by and through NTT. We calculate that NTT, which currently owns 62.15 percent of the issued and outstanding shares of DoCoMo, indirectly will hold a 62.15 percent equity and voting interest in DoCoMo Guam.<sup>222</sup> Based on the information in the record of the instant proceeding, we find that NTT's interests in DoCoMo Guam are properly ascribed to Japan, a WTO Member country.<sup>223</sup>

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<sup>218</sup> Application at 1-2, 21; July 24, 2006 Response to IB Information Request at 3.

<sup>219</sup> July 24, 2006 Response to IB Information Request at 2 (62.15% as of March 31, 2006, the date of the most recent shareholder list); Application, Attachment, at 4, 18 (DoCoMo is organized under the laws of Japan; NTT reorganized as a holding company in 1999). Both DoCoMo and NTT have a simple equity capital structure consisting of a single class of common stock with one vote per share. September 27, 2006 Response to IB Information Request at 1.

<sup>220</sup> July 24, 2006 Response to IB Information Request at 2 (as of March 31, 2006, Japan Ministry of Finance held 38.53% of NTT's outstanding voting shares); Application at 19 (NTT Law requires that Japanese government own one-third or more of total number of issued shares of NTT, and foreign nationals and corporations may own up to one-third of NTT's total voting shares).

<sup>221</sup> DoCoMo is a corporation organized under the laws of Japan. Application, Attachment, at 6, 43. *See also* NTT DoCoMo, Inc., Form 20-F, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended March 31, 2006 ("DoCoMo 20-F") at 12. In addition, the Applicants state that: the majority of DoCoMo's investment principals, officers, and directors are Japanese; DoCoMo's world headquarters is located in Japan; the majority of DoCoMo's tangible property is located in Japan; and DoCoMo derives the greatest sales and revenues from its operations in Japan. Application at 43 n.100. *See also, e.g.*, DoCoMo 20-F at 12 (corporate headquarters are in Tokyo), 59 (NTT, a Japanese company, is largest shareholder), 88-92 (listing corporate officers and directors).

<sup>222</sup> Consistent with our foreign ownership case precedent discussed in Section V.A above, NTT's 62.15% equity and voting interests in DoCoMo flow through in their entirety to DoCoMo Guam because DoCoMo holds 100% of the equity and voting interests in DoCoMo Guam.

<sup>223</sup> NTT is a company organized under the laws of Japan. Application, Attachment, at 43. *See also* Nippon Telegraph and Telephone Corporation, Form 20-F, Annual Report Pursuant to Section 13 or 15(d) of the Securities (continued....)

65. We also calculate that the Japan Ministry of Finance will hold 23.95 percent of the equity interests and 38.53 percent of the voting interests in DoCoMo Guam.<sup>224</sup> We find that these interests, which are held by the Japanese government through the Ministry of Finance, also are properly ascribed to Japan, a WTO Member country.

66. We note that DoCoMo and NTT are publicly traded companies.<sup>225</sup> Shareholders other than NTT collectively hold approximately 37.85 percent of DoCoMo. The Applicants represent that approximately 9.3 percent of DoCoMo's issued and outstanding shares is held by foreign investors from countries other than Japan and the United States, and that all of these shareholders are from WTO Member countries.<sup>226</sup> The Applicants additionally represent that approximately 11.6 percent of NTT's issued and outstanding shares is held by investors from countries other than Japan or the United States, and that all but three of these shareholders, who collectively hold only 38 out of 13.78 million shares, are from WTO Member countries.<sup>227</sup> On this basis, we find that investors from non-WTO Member countries hold indirectly less than one percent of DoCoMo's equity and voting interests.<sup>228</sup> Thus, upon

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Exchange Act of 1934 for the Fiscal Year Ended March 31, 2006 ("NTT 20-F") at 17, 20. In addition, the Applicants state that: the majority of NTT's investment principals, officers, and directors are Japanese; NTT's world headquarters is located in Japan; the majority of NTT's tangible property is located in Japan; and NTT derives the greatest sales and revenues from its operations in Japan. Application, Attachment, at 43 n.100. *See also, e.g.*, NTT 20-F at 20 (NTT is located in Tokyo), 22-23 (under NTT law, aggregate amount of NTT's voting rights that may be owned by foreign nationals and corporations must be less than one-third of NTT's total voting rights, and Japanese government is required to own one-third or more of total number of issued shares of NTT), 90-93 (listing corporate officers and directors).

<sup>224</sup> Consistent with our foreign ownership case precedent discussed in Section V.A above, we use the multiplier to calculate the indirect equity interests of the Japan Ministry of Finance in DoCoMo as follows:  $38.53\% \times 62.15\% = 23.95\%$ . By contrast, we do not use the multiplier to calculate the indirect voting interest of the Japan Ministry of Finance in DoCoMo, which the Ministry holds through its voting interest in NTT (*i.e.*, we do not multiply the Japanese government's voting interest in NTT by NTT's 62.15% voting interest in DoCoMo). NTT currently owns a majority interest in DoCoMo and has the right to appoint the majority of the board of directors of DoCoMo. July 24, 2006 Response to IB Information Request at 2, 3-4. Because of these factors, we find that NTT controls DoCoMo and, thus, that the multiplier should not be applied to this link of the vertical ownership chain for the calculation of voting interests. *See supra* ¶ 60. We therefore calculate the voting interest of the Japanese government in DoCoMo as 38.53%, which is its voting interest in NTT.

<sup>225</sup> Application, Attachment, at 3, 9, 18; July 24, 2006 Response to IB Information Request at 2.

<sup>226</sup> July 24, 2006 Response to IB Information Request at 3.

<sup>227</sup> *Id.*

<sup>228</sup> Consistent with our foreign ownership case precedent discussed in Section V.A above, we use the multiplier to calculate the indirect equity interests of NTT's non-WTO shareholders in DoCoMo as follows:  $(38/13,780,000 = 0.00028\%) \times 62.15\% = 0.000002\%$ . By contrast, we do not use the multiplier to calculate the indirect voting interests of NTT's non-WTO shareholders in DoCoMo (*i.e.*, we do not multiply non-WTO shareholder voting interests in NTT by NTT's 62.15% voting interest in DoCoMo). As noted, NTT currently owns a majority interest in DoCoMo and has the right to appoint the majority of the board of directors of DoCoMo. *See supra* ¶ 64, note 222; July 24, 2006 Response to IB Information Request at 2, 3-4. Because of these factors, we have found that NTT controls DoCoMo and, thus, that the multiplier should not be applied to this link of the vertical ownership chain for the calculation of voting interests. *See id.* We therefore calculate the indirect voting interests of NTT's non-WTO shareholders in DoCoMo as follows:  $38/13,780,000 = 0.00028\%$ .

consummation of the proposed transaction, investors from non-WTO Member countries would hold indirectly less than one percent of DoCoMo Guam's equity and voting interests.<sup>229</sup>

67. The record indicates that the vast majority of the foreign equity and voting interests that will be held directly and indirectly in DoCoMo Guam are properly ascribed to WTO Member countries. DoCoMo Guam and its proposed wholly-owned subsidiary Guam Cellular therefore are entitled to a rebuttable presumption that, following consummation of the proposed transaction, the indirect foreign ownership in Guam Cellular would not pose a risk to competition in the U.S. market. We find no evidence in the record that rebuts this presumption and, as we explain above, we find no basis to conclude that the proposed transaction is likely to harm competition.<sup>230</sup> As described in Section VI below, we regulate Guam Cellular as a dominant carrier in its provision of common carrier services on the U.S.-Japan route.<sup>231</sup> We also determine in Section VII below that the Executive Branch Agreement among the Executive Branch Entities and the Applicants addresses any national security, law enforcement, and public safety concerns.<sup>232</sup>

### C. Declaratory Ruling

68. Accordingly, this declaratory ruling permits the indirect foreign ownership of Guam Cellular by DoCoMo and its Japanese shareholders (up to and including 100 percent of the equity and voting interests), with the exception of NTT; by NTT and its Japanese shareholders, through NTT's investment in DoCoMo (up to and including 62.15 percent of the equity and voting interests), with the exception of the Japan Ministry of Finance; and by the Japan Ministry of Finance, through its investment in NTT (up to and including 23.95 percent of the equity interests and 38.53 percent of the voting interests). Guam Cellular may accept up to and including an additional aggregate 25 percent indirect foreign equity and/or voting interests from these foreign investors and other foreign investors, including non-Japanese investors who may own shares in DoCoMo and/or in NTT, without seeking prior Commission approval under

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<sup>229</sup> The less-than-one-percent indirect equity and voting interests that would be held indirectly in DoCoMo by non-WTO investors flow through in their entirety to DoCoMo Guam because DoCoMo would hold 100% of the equity and voting interests in DoCoMo Guam upon closing. *See supra* Section V.A. *See also supra* ¶ 64, note 222.

<sup>230</sup> *See supra* Section IV (Competitive Analysis). TeleGuam argues that the level of ownership and control by the Japanese government in DoCoMo calls for heightened scrutiny by the Commission. Petition to Deny at 3-5. We find no evidence that the Japanese government's 38.53% shareholding in NTT poses a threat to competition in the United States. Under the NTT Law, the appointment of NTT's directors and corporate auditors, changes to NTT's articles of incorporation, the disposition of profits, and the issuance of new shares require government approval. Application, Attachment, at 20. Applicants state, however, that it has been government policy since 1997 not to use the government's position as a shareholder to direct the management of NTT and, to the extent that NTT companies have transacted business with departments of the Japanese government, it has been on an arm's-length basis. *Id.* Applicants further state that the Japanese government currently does not hold a position on NTT's board of directors. Application, Attachment, at 20. Further, the NTT Law does not apply to DoCoMo. Application, Attachment, at 19. DoCoMo conducts its day-to-day operations independently of NTT, and neither NTT nor the Japanese government possesses special or preferential voting rights in DoCoMo. Application at 9-10. In addition, as the Commission stated in the *Foreign Participation Order*, the commitments made by WTO Members, such as Japan, the Commission's regulatory safeguards, and antitrust law should adequately address competitive concerns resulting from participation by foreign carriers from WTO Member countries in the U.S. telecommunications market. *Foreign Participation Order*, 12 FCC Rcd at 23905-09 ¶¶ 33-41.

<sup>231</sup> *See infra* ¶¶ 69-72.

<sup>232</sup> *See infra* ¶¶ 73-75.

section 310(b)(4), subject to three conditions. First, for purposes of calculating the aggregate 25 percent amount, Guam Cellular shall include non-U.S., non-Japanese owners of DoCoMo and NTT. Second, Guam Cellular shall obtain prior Commission approval before any foreign individual or entity, with the exception of NTT and the Japan Ministry of Finance, acquires individually an indirect equity and/or voting interest in Guam Cellular that exceeds 25 percent. Third, Guam Cellular shall obtain prior Commission approval before its direct or indirect equity and/or voting interest from non-WTO Member countries exceeds 25 percent. We emphasize that, as a Commission licensee, Guam Cellular has an affirmative duty to continue to monitor its foreign equity and voting interests and to calculate these interests consistent with the attribution principles enunciated by the Commission.<sup>233</sup>

## VI. DOMINANT CARRIER SAFEGUARDS

69. The Applicants seek consent to transfer control of the international section 214 authorizations held by Guam Cellular and to assign to Guam Cellular the international section 214 authorization held by Guam Wireless.<sup>234</sup> Pursuant to section 63.10 of the Commission's rules, the Applicants ask the Commission to grant Guam Cellular non-dominant status on all U.S. international routes except the U.S.-Japan route.<sup>235</sup>

70. As part of our public interest analysis under section 214(a) of the Act, we consider whether, upon consummation of the proposed transaction, the international section 214 authorization holder, Guam Cellular, will become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that Guam Cellular has authority to serve pursuant to the international section 214 authorizations that will be transferred and assigned.<sup>236</sup> Under rules adopted in the *Foreign Participation Order*, the Commission classifies a U.S. carrier as "dominant" on a particular route if it is, or is affiliated with, a foreign carrier that has market power on the foreign end of that route.<sup>237</sup>

71. Following consummation of the proposed transaction, Guam Cellular will become affiliated, within the meaning of section 63.09 of the Commission's rules, with DoCoMo and other foreign carrier

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<sup>233</sup> See, e.g., *Foreign Ownership Guidelines*, 19 FCC Rcd 22612 (2004), *erratum*, 21 FCC Rcd 6484 (2006).

<sup>234</sup> See File Nos. ITC-T/C-20060405-00234 and ITC-ASG-20060404-00181.

<sup>235</sup> See, e.g., File No. ITC-T/C-20060405-00234 at 6; 47 C.F.R. § 63.10.

<sup>236</sup> 47 U.S.C. § 214(a).

<sup>237</sup> *Foreign Participation Order*, 12 FCC Rcd at 23987, 23991-99 ¶¶ 215, 221-39. A carrier classified as dominant on a particular U.S. international route due to an affiliation with a foreign carrier that has market power on the foreign end of the route is subject to specific international dominant carrier safeguards set forth in section 63.10 of the rules. 47 C.F.R. § 63.10(c), (e). These safeguards are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates (*i.e.*, vertical harms). In the *Foreign Participation Order*, the Commission concluded that these safeguards, in conjunction with generally applicable international safeguards, are sufficient to protect against vertical harms by carriers from WTO Member countries in virtually all circumstances. In the exceptional case where an application poses a very high risk to competition in the U.S. market – where the standard safeguards and additional conditions would be ineffective – the Commission reserves the right to deny the application. *Foreign Participation Order*, 12 FCC Rcd at 23913-14 ¶ 51. In circumstances where an affiliated foreign carrier possesses market power in a non-WTO Member country, the Commission applies the effective competitive opportunities, or "ECO," test as part of its public interest inquiry under section 214(a). *Foreign Participation Order*, 12 FCC Rcd at 23944 ¶ 124.

service providers.<sup>238</sup> We find that, except for DoCoMo and its subsidiaries and affiliates that provide service in Japan, none of the foreign carriers with which Guam Cellular will be affiliated is a monopoly provider of communications services or has a 50 percent market share in the international transport or local access market on the foreign end of a U.S. international route. Therefore, we will classify Guam Cellular as non-dominant on all U.S. international routes except the U.S.-Japan route.

72. With respect to the U.S.-Japan route, the Applicants do not request non-dominant classification, and we find no evidence in the record to support classification of Guam Cellular as non-dominant after consummation of the proposed transaction. We also find that the dominant carrier safeguards in section 63.10 will protect sufficiently against any potential vertical harms to U.S. customers on this route. Accordingly, pursuant to section 214(a) of the Act and section 63.10 of the Commission's rules, we condition our grant of the international section 214 transfer and assignment applications on the classification of Guam Cellular as a dominant carrier on the U.S.-Japan route effective upon closing of the proposed transaction.

## VII. NATIONAL SECURITY, LAW ENFORCEMENT, FOREIGN POLICY, AND TRADE CONCERNS

73. When analyzing a transfer of control or assignment application in which foreign investment is involved, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch.<sup>239</sup> The Executive Branch Agreement among the Executive Branch Entities and Guam Cellular and DoCoMo Guam addresses Executive Branch national security, law enforcement, and public safety concerns about the post-transaction Guam Cellular system.<sup>240</sup>

74. The Executive Branch Agreement states that Guam Cellular and DoCoMo Guam have entered into the Executive Branch Agreement with the Executive Branch Entities to address issues raised by those departments and agencies, and to request the Commission to condition the grant of the assignment and transfer of control applications on compliance with the Executive Branch Agreement.<sup>241</sup> The Executive Branch Petition states that the Executive Branch Entities have taken the position that their ability to satisfy their obligations to protect the national security, enforce the laws, and preserve the safety of the public could be impaired by transactions in which foreign entities will own or operate a part of the U.S. telecommunications system, or in which foreign-located facilities will be used to provide domestic telecommunications services to U.S. customers.<sup>242</sup> After discussions with representatives of DoCoMo, the Executive Branch Entities have concluded that the commitments set forth in the Executive Branch

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<sup>238</sup> 47 C.F.R. § 63.09. See, e.g., File No. ITC-T/C-20060405-00234 at 5-6 (Guam Cellular will become affiliated with foreign carriers in Japan, the United Kingdom, France, Italy, Germany, Belgium, the Netherlands, Hong Kong, China, Korea, Australia, Singapore, Brazil, Taiwan, Malaysia, and Sri Lanka). Each of these countries is a WTO Member. See Understanding the WTO: The Organization, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 19, 2006).

<sup>239</sup> *Foreign Participation Order*, 12 FCC Rcd at 23918 ¶ 59; Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111, *Report and Order*, 12 FCC Rcd 24094, 24170 ¶ 178 (1997).

<sup>240</sup> See *supra* ¶ 11.

<sup>241</sup> Executive Branch Agreement at 2, Recitals.

<sup>242</sup> Executive Branch Petition at 2 (unpaginated).

Agreement address their concerns, and therefore asked the Commission to condition the grant on the Applicants' compliance with the commitments set forth in the Executive Branch Agreement.<sup>243</sup>

75. In assessing the public interest, we take into account the record and accord deference to Executive Branch expertise on national security and law enforcement issues.<sup>244</sup> As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.<sup>245</sup> We note that certain commenters suggest that national security issues warrant denial or conditions on the proposed transaction.<sup>246</sup> We conclude that adoption of the network security condition sought by the Executive Branch Entities addresses these concerns.<sup>247</sup> In accordance with the request of the Executive Branch Entities, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Application on compliance, by DoCoMo Guam and Guam Cellular, with the commitments set forth in the Executive Branch Agreement. We include the Executive Branch Petition and the Executive Branch Agreement as an Appendix to this Memorandum Opinion and Order and Declaratory Ruling.

## VIII. CONCLUSION

76. We find that competitive harm is unlikely in both Guam and the CNMI mobile telephony markets as a result of this transaction. Both markets appear to have sufficient current and potential competitive wireless telephony operators after the transaction to curb any potential anticompetitive conduct by the merged entity. We find that the merged entity is unlikely to exercise market power to raise prices or reduce outputs. It is also unlikely that, given the number of competitors in the market, coordinated interactions will prevail after the transaction. Further, we find no record evidence to conclude that the foreign ownership of DoCoMo Guam, the parent of Guam Cellular, would pose a risk to competition in the U.S. market. We classify Guam Cellular as a dominant international carrier in its provision of service on the U.S.-Japan route effective upon consummation of the transfers and assignments of the relevant international section 214 authorizations. We determine that the Executive Branch Agreement among the Executive Branch Entities and the Applicants addresses any national security, law enforcement, and public safety concerns, and we condition the grant of the applications and declaratory ruling on compliance with the commitments made by Guam Cellular and DoCoMo Guam in the Executive Branch Agreement.

## IX. ORDERING CLAUSES

77. Accordingly, having reviewed the applications, the petition, and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, 310 (b), 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the assignment of licenses

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<sup>243</sup> *Id.*

<sup>244</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23919-21 ¶¶ 61-66.

<sup>245</sup> *Id.* at 23919 ¶ 62.

<sup>246</sup> See, e.g., Petition to Deny at 5-8; Reply at 5-6 (arguing that the Commission should restrict DoCoMo and the Guam carriers it controls from entering into government contracts to avoid national security risks); Comments of CDG at 2 (stating that it is critical that government and military personnel, among others, have reasonable access to roaming services for their CDMA-based wireless services).

<sup>247</sup> See *infra* ¶ 79.

from Guam Wireless to Guam Cellular and the transfer of control of licenses from Guam Cellular to DoCoMo Guam, and the petition are GRANTED, to the extent specified in this Memorandum Opinion and Order and Declaratory Ruling.

78. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and sections 63.04 and 63.24 of the Commission's rules, 47 C.F.R. §§ 63.04, 63.24, the applications to assign international section 214 authorizations from Guam Wireless to Guam Cellular and transfer control of domestic and international section 214 authorizations from Guam Cellular to DoCoMo Guam are GRANTED.

79. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 214, 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214, 309, 310(b), 310(d), the Petition to Adopt Conditions to Authorizations and Licenses filed jointly by the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Department of Homeland Security on October 19, 2006 IS GRANTED. Grant of the applications and the declaratory ruling IS CONDITIONED UPON compliance with the commitments set forth in the Executive Branch Agreement, attached to this Memorandum Opinion and Order and Declaratory Ruling as an Appendix.

80. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 63.10 of the Commission's rules, 47 C.F.R. § 63.10, Guam Cellular SHALL BE CLASSIFIED as a dominant international carrier in its provision of service on the U.S.-Japan route effective upon consummation of the transfers and assignment of the international section 214 authorizations specified in this Memorandum Opinion and Order and Declaratory Ruling.

81. IT IS FURTHER ORDERED that the above grant shall include authority for DoCoMo to acquire control of: (a) any license or authorization issued to Guam Cellular or Guam Wireless and its subsidiaries during the Commission's consideration of the transfer of control applications or the period required for consummation of the transaction following approval; (b) construction permits held by such licensees that mature into licenses after closing; and (c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

82. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petition to Deny the assignment of licenses from Guam Wireless to Guam Cellular and the transfer of control of licenses from Guam Cellular to DoCoMo Guam filed by TeleGuam is DENIED for the reasons stated herein.

83. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX**

**PETITION TO ADOPT CONDITIONS AND EXECUTIVE BRANCH AGREEMENT**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Guam Cellular & Paging, Inc.	)	
<i>Transferor,</i>	)	0002556700
	)	0002553437
and	)	IB File No. ITC-T/C-20060405-00234
	)	IB File No. ITC-ASG-20060404-00181
DoCoMo Guam Holdings, Inc.,	)	
<i>Transferee,</i>	)	WC Docket No. 06-96
	)	
Joint Application for Consent to Transfer Control	)	
of Guam Cellular & Paging, Inc.	)	

**PETITION TO ADOPT CONDITIONS TO  
AUTHORIZATIONS AND LICENSES**

The United States Department of Justice (“DOJ”), including the Federal Bureau of Investigation (“FBI”), together with the United States Department of Homeland Security (“DHS”) (collectively, the “Agencies”), respectfully submit this Petition to Adopt Conditions to Authorizations and Licenses (“Petition”), pursuant to Section 1.41 of the Federal Communications Commission’s (“FCC” or “Commission”) rules.<sup>248</sup> Through this Petition, the Agencies advise the Commission that they have no objection to the Commission granting its consent in the above-referenced proceeding, provided that the Commission conditions the grant on DoCoMo Guam Holdings, Inc., (“DoCoMo”) abiding by the commitments and undertakings contained in their Security Agreement (the “Agreement”) attached hereto as Exhibit 1.

In the above-captioned proceedings, DoCoMo proposes to transfer control of Guam Cellular & Paging, Inc. (“Guam Cellular”) to DoCoMo and to assign certain wireless assets of Guam Wireless Telephone Co. LLC (Guam Wireless) to Guam Cellular, as controlled directly by DoCoMo.

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<sup>248</sup> 47 C.F.R. § 1.41.

DoCoMo has filed a series of applications pursuant to Sections 214 and 310 with the FCC seeking consent for the transfer of control of Guam Cellular, and assignment of Guam Wireless to Guam Cellular as controlled directly by DoCoMo.<sup>249</sup>

As the Commission is aware, the Agencies have taken the position that their ability to satisfy their obligations to protect the national security, enforce the laws, and preserve the safety of the public could be impaired by transactions in which foreign entities will own or operate a part of the U.S. telecommunications system, or in which foreign-located facilities will be used to provide domestic telecommunications services to U.S. customers. After discussions with representatives of DoCoMo, the Agencies have concluded that the commitments set forth in the Agreement will help ensure that the Agencies and other entities with responsibility for enforcing the law, protecting the national security, and preserving public safety can proceed in a legal, secure, and confidential manner to satisfy these responsibilities. Accordingly, the Agencies hereby advise the Commission that they have no objection to the Commission granting the above-referenced Applications, provided that the Commission conditions its consent on compliance by the Applicant with the commitments set forth in the Agreement.

The Agencies are authorized to state that the Applicant does not object to the grant of this Petition.

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<sup>249</sup> See *NTT Docomo Inc., Guam Cellular and Paging, Inc., and Guam Wireless Telephone Company, L.L.C. Seek FCC Consent to Assign and Transfer Control of Licenses and Authorizations and Request a Declaratory Ruling on Foreign Ownership*, Public Notice, DA 06-947, WT Docket No. 06-96 (May 10, 2006).

Respectfully submitted,

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Sigal P. Mandelker  
Deputy Assistant Attorney General  
Office of the Assistant Attorney General  
Criminal Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530  
(202) 305-8319

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Elaine N. Lammert  
Deputy General Counsel  
Federal Bureau of Investigation  
923 Pennsylvania Avenue, N.W.  
Washington, DC 20532  
(202) 324-1530

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Stewart A. Baker  
Assistant Secretary for Policy  
United States Department of Homeland Security  
3801 Nebraska Avenue, N.W.  
Washington, D.C. 20528  
(202) 282-9708

October [ ], 2006

## AGREEMENT

This AGREEMENT is made as of the date of the last signature affixed hereto by and between Guam Cellular and Paging, Inc. (“GC”) and DoCoMo Guam Holdings, Inc. (“DCMG”), on the one hand, and the Federal Bureau of Investigation (“FBI”), the U.S. Department of Justice (“DOJ”), and the U.S. Department of Homeland Security (“DHS”), on the other (referred to individually as a “Party” and collectively as the “Parties”).

## RECITALS

**WHEREAS**, U.S. communication systems are essential to the ability of the U.S. government to fulfill its responsibilities to the public to preserve the national security of the United States, to enforce the laws, and to maintain the safety of the public;

**WHEREAS**, the U.S. government has an obligation to the public to ensure that U.S. communications and related information are secure in order to protect the privacy of U.S. persons and to enforce the laws of the United States;

**WHEREAS**, it is critical to the well being of the nation and its citizens to maintain the viability, integrity, and security of the communications systems of the United States (*see, e.g.*, Executive Order 13231, Critical Infrastructure Protection in the Information Age, and Homeland Security Presidential Directive 7, Critical Infrastructure Identification, Prioritization, and Protection);

**WHEREAS**, protection of Classified, Controlled Unclassified, and Sensitive Information is also critical to U.S. national security;

**WHEREAS**, GC has an obligation to protect from unauthorized disclosure the contents of wire and electronic communications;

**WHEREAS**, GC holds the cellular A block licenses in Guam and the Commonwealth of Northern Mariana Island (“CNMI”). GC also holds several other licenses in Guam and the CNMI, including paging, common carrier fixed point-to-point microwave, industrial/business pool, wireless communications service, and 700 MHz lower band licenses. In addition, GC holds two international Section 214 licenses authorizing it to provide international global resale and facilities-based telecommunications services pursuant to Section 214 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 214. GC has provided high quality mobile wireless services, based upon the CDMA wireless standard, to residents of and visitors to Guam and the CNMI since 1992. GC also provides paging services, business and residential wireline domestic long distance and international (via direct dialing and calling card) services, and dial-up and DSL Internet access services. GC provides service under the brand names “Guamcell Communications” in Guam and “Saipancell Communications” in the CNMI.

**WHEREAS**, Guam Wireless Telephone Company L.L.C. (“Guam Wireless”) holds a broadband Personal Communications Service (“PCS”) B block license that serves Guam and the CNMI. Guam Wireless also holds an international Section 214 license pursuant to Section 214

of the Act authorizing it to provide international telecommunications services on a global resale and facilities basis. Guam Wireless provides high quality mobile wireless services under the brand name “HafaTEL” to residents of and visitors to Guam and the CNMI using the GSM wireless standard.

**WHEREAS**, GC is the subject of the Share Purchase Agreement among NTT DoCoMo, Inc. (“DCM”), GC, and GC’s shareholders dated as of March 20, 2006 (“SPA”);

**WHEREAS**, Guam Wireless is the subject to the Asset Purchase Agreement among DCM, Guam Wireless, and Guam Wireless’ shareholders dated as of March 20, 2006 (“APA”);

**WHEREAS**, DCM, GC and Guam Wireless have filed with the Federal Communications Commission (“FCC”) applications (in FCC IB Docket No. 06-96) under Sections 214 and 310(d) of the Act, 47 U.S.C. §§ 214, 310(d), seeking FCC consent to assign and transfer of control Guam Wireless’ and GC’s licenses and requesting a declaratory ruling pursuant to Section 310(b)4 of the Act, 47 U.S.C. § 310(b)(4), that the proposed foreign ownership by DCMG is in the public interest;

**WHEREAS**, as disclosed to the FCC, DCMG is a corporation, organized and existing under the laws of the Guam, and which is a wholly-owned subsidiary of DCM, a Japanese corporation existing under the laws of the Japan;

**WHEREAS**, the FCC’s grant of the applications in FCC IB Docket No. 06-96 may be made subject to conditions relating to national security, law enforcement, and public safety, and whereas GC and DCMG each have entered into this Agreement with the FBI, the DOJ, and the DHS to address issues raised by those departments and agencies, and to request that the FCC condition the assignment and transfer of control approved by the FCC on their compliance with this Agreement;

**NOW THEREFORE**, the Parties are entering into this Agreement to address national security, law enforcement and public safety issues.

## **ARTICLE 1: DEFINITION OF TERMS**

As used in this Agreement:

1.1 “APA” has the meaning given in the Recitals.

1.2 “Call Associated Data” means any information related to a Domestic Communication or related to the sender or recipient of that Domestic Communication and, to the extent maintained by a Domestic Communications Company in the normal course of business, includes without limitation subscriber identification, called party number, calling party number, start time, end time, call duration, feature invocation and deactivation, feature interaction, registration information, user location, diverted to number, conference party numbers, post cut-through dial digit extraction, in-band and out-of-band signaling, and party add, drop and hold.

1.3. “Classified Information” means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.

1.4. “Control” and “Controls” means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an entity, or by proxy voting, contractual arrangements, or other means, to determine, direct, or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding:

- (i) the sale, lease, mortgage, pledge, or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;
  - (ii) the dissolution of the entity;
  - (iii) the closing and/or relocation of the production or research and development facilities of the entity;
  - (iv) the termination or nonfulfillment of contracts of the entity;
  - (v) the amendment of the articles of incorporation or constituent agreement of the entity with respect to the matters described in subsections (i) through (iv) above;
- or
- (vi) GC’s obligations under this Agreement.

1.5. “Controlled Unclassified Information” means unclassified information, the export of which is controlled by the International Traffic in Arms Regulations (“ITAR”), 22 C.F.R. Chapter I, Subchapter M, or the Export Administration Regulations (“EAR”), 15 C.F.R., Chapter VII, Subchapter C.

1.6. “DCM” means NTT DoCoMo, Inc.

1.7. “DCMG” means DoCoMo Guam Holdings, Inc.

1.8. “De facto” and “de jure” control have the meanings provided in 47 C.F.R. § 1.2110.

1.9. “DHS” means the U.S. Department of Homeland Security.

1.10. “DOJ” means the U.S. Department of Justice.

1.11. “Domestic Communications” means (i) Wire Communications or Electronic Communications (whether stored or not) from one U.S. location to another U.S. location and (ii) the U.S. portion of a Wire Communication or Electronic Communication (whether stored or not) that originates or terminates in the United States.

1.12. “Domestic Communications Company” means all those subsidiaries, divisions, departments, branches and other components of DCMG, and any other entity over which DCMG has *de facto* or *de jure* control, that provide Domestic Communications, including GC. If any subsidiary, division, department, branch or other component of DCMG, or any other entity over which DCMG has *de facto* or *de jure* control, provides Domestic Communications after the date that all the Parties execute this Agreement, then such entity shall be deemed to be a Domestic Communications Company. If any Domestic Communications Company enters into joint ventures under which a joint venture or another entity may provide Domestic Communications and if a Domestic Communications Company has the power or authority to exercise *de facto* or *de jure* control over such entity, then DCMG will ensure that that entity shall fully comply with the terms of this Agreement. The term “Domestic Communications Company” shall not include acquisitions by DCMG in the U.S. after the date that this Agreement is executed by all parties only if the DOJ or the FBI find that the terms of this Agreement are inadequate to address national security, law enforcement or public safety concerns presented by that acquisition and the necessary modifications to this Agreement cannot be reached pursuant to Section 8.6 below. Nothing in this definition shall exempt any Domestic Communications Company from its obligations under Section 5.3.

1.13. “Domestic Communications Infrastructure” means (a) transmission, switching, bridging and routing equipment (including software and upgrades) subject to control by and used by or on behalf of a Domestic Communications Company to provide, process, direct, control, supervise or manage Domestic Communications; (b) facilities and equipment used by or on behalf of a Domestic Communications Company that are physically located in the United States; and (c) facilities used by or on behalf of a Domestic Communications Company to control the equipment described in (a) and (b) above. Domestic Communications Infrastructure does not include equipment or facilities used by service providers other than Domestic Communications Companies that are: (a) interconnecting communications providers; or (b) providers of services or content that are (1) accessible using the communications services of Domestic Communications Companies, and (2) available in substantially similar form and on commercially reasonable terms through communications services of companies other than Domestic Communications Companies. The phrase “on behalf of” as used in this Section does not include entities with which a Domestic Communications Company has contracted for peering, interconnection, roaming, long distance, or other similar arrangements on which the parties may agree. Domestic Communications Infrastructure does not include equipment dedicated to the termination of international undersea cables, provided that such equipment is utilized solely to effectuate the operation of undersea transport network(s) outside of the United States and in no manner controls land-based transport network(s) or their associated system in the United States.

1.14. “Effective Date” means the date on which the transactions contemplated by the SPA and APA are consummated.

1.15. “Electronic Communication” has the meaning given it in 18 U.S.C. § 2510(12).

1.16. “Electronic Surveillance” means: (a) the interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 2510(4), (1), (2), and (12), respectively, and

electronic surveillance as defined in 50 U.S.C. § 1801(f); (b) access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701 et seq.; (c) acquisition of dialing, routing, addressing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (d) acquisition of location- related information concerning a service subscriber or facility; (e) preservation of any of the above information pursuant to 18 U.S.C. § 2703(f); and (f) access to, or acquisition or interception of, or preservation of communications or information as described in (a) through (e) above and comparable state laws.

1.17. “FBI” means the Federal Bureau of Investigation.

1.18. “Foreign” where used in this Agreement, whether capitalized or lower case, means non-U.S.

1.19. “GC” means Guam Cellular and Paging, Inc.

1.20. “Governmental Authority” or “Governmental Authorities” means any government, or any governmental, administrative, or regulatory entity, authority, commission, board, agency, instrumentality, bureau, or political subdivision, and any court, tribunal, judicial, or arbitral body.

1.21. “Intercept” or “Intercepted” has the meaning defined in 18 U.S.C. § 2510(4).

1.22. “Lawful U.S. Process” means lawful U.S. Federal, state, or local Electronic Surveillance or other court orders, processes, or authorizations issued under U.S. Federal, state, or local law for physical search or seizure, production of tangible things, or access to or disclosure of Domestic Communications, Call Associated Data, Transactional Data, or Subscriber Information.

1.23. “Network Management Information” means network management operations plans, processes and procedures; the placement of Network Operating Center(s) and linkages (for service off load or administrative activities) to other domestic and international carriers, ISPs and other critical infrastructures; descriptions of IP networks and operations processes and procedures for management control and relation to the backbone infrastructure(s) including other service providers; description of any unique/proprietary control mechanisms as well as operating and administrative software; and network performance information.

1.24. “OPM” means the Office of Personnel Management of the U.S. Government.

1.25. “Party” and “Parties” have the meanings given them in the Preamble.

1.26. “Pro forma assignments” or “pro forma transfers of control” are transfers that do not involve a substantial change in ownership or control as provided by the FCC’s Rules.

1.27. “Share Purchase Agreement” has the meaning given in the Recitals.

1.28. “Security Officer” has the meaning given in Sections 3.10.

1.29. “Sensitive Information” means information that is not Classified Information regarding (a) the persons or facilities that are the subjects of Lawful U.S. Process, (b) the identity of the government agency or agencies serving such Lawful U.S. Process, (c) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance pursuant to Lawful U.S. Process, (d) the means of carrying out Electronic Surveillance pursuant to Lawful U.S. Process, (e) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful U.S. Process, (f) information deemed to be Sensitive Information pursuant to Executive Order, decision or guidelines, and (g) other information that is not Classified Information designated in writing by an authorized official of a Federal, state or local law enforcement agency or a U.S. intelligence agency as “Sensitive Information.” Domestic Communications Companies may dispute pursuant to Article 4 whether information is Sensitive Information under this subparagraph. Such information shall be treated as Sensitive Information unless and until the dispute is resolved in the Domestic Communications Companies’ favor.

1.30. “Subscriber Information” means information relating to subscribers or customers of a Domestic Communications Company of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709. Such information shall also be considered Subscriber Information when it is sought pursuant to the provisions of other Lawful U.S. Process.

1.31. “Transactional Data” means:

- (i) “call identifying information,” as defined in 47 U.S.C. § 1001(2), including without limitation the telephone number or similar identifying designator associated with a Domestic Communication;
- (ii) any information possessed by a Domestic Communications Company relating specifically to the identity and physical address of a customer or subscriber, or account payer, or the end-user of such customer or subscriber, or account payer, or associated with such person relating to all telephone numbers, domain names, IP addresses, Uniform Resource Locators (“URLs”), other identifying designators, types of services, length of service, fees, usage including billing records and connection logs, and the physical location of equipment, if known and if different from the location information provided under (iii) below;
- (iii) the time, date, size or volume of data transfers, duration, domain names, MAC or IP addresses (including source and destination), URLs, port numbers, packet sizes, protocols or services, special purpose flags, or other header information or identifying designators or characteristics associated with any Domestic Communication, including electronic mail headers showing From: and To: addresses; and

- (iv) as to any mode of transmission (including mobile transmissions), and to the extent permitted by U.S. laws, any information indicating as closely as possible the physical location to or from which a Domestic Communication is transmitted. The term includes all records or other information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c)(1) and (d), but does not include the content of any communication. The phrase “on behalf of” as used in this Section does not include entities with which a Domestic Communications Company has contracted for peering, interconnection, roaming, long distance, or other similar arrangements on which the parties may agree.

1.32. “United States,” “US,” or “U.S.” means the United States of America including all of its States, districts, territories, possessions, commonwealths, and the special maritime and territorial jurisdiction of the United States, and specifically includes Guam and the Commonwealth of the Northern Mariana Islands.

1.33. “Wire Communication” has the meaning given it in 18 U.S.C. § 2510(1).

1.34. Other Definitional Provisions. Other capitalized terms used in this Agreement and not defined in this Article shall have the meanings assigned them elsewhere in this Agreement. The definitions in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term. Whenever the words “include,” “includes,” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation.”

## **ARTICLE 2: FACILITIES, INFORMATION STORAGE AND ACCESS**

2.1. Domestic Communications Infrastructure. Except to the extent and under conditions concurred in by the FBI, DOJ and DHS in writing:

- (i) all Domestic Communications Infrastructure that is owned, operated or controlled by a Domestic Communications Company shall at all times be located in the United States and will be directed, controlled, supervised and managed by a Domestic Communications Company; and
- (ii) all Domestic Communications that are carried by or through, in whole or in part, Domestic Communications Infrastructure shall pass through a facility under the control of a Domestic Communications Company and physically located in the United States, from which Electronic Surveillance can be conducted pursuant to Lawful U.S. Process. The Domestic Communications Company will provide technical or other assistance to facilitate such Electronic Surveillance.

2.2. Compliance with Lawful U.S. Process. Domestic Communications Companies shall take all practicable steps to configure their Domestic Communications Infrastructure to be capable of complying, and Domestic Communications Company employees in the United States will have unconstrained authority to comply, in an effective, efficient, and unimpeded fashion, with:

- (i) Lawful U.S. Process;
- (ii) the orders of the President in the exercise of his/her authority under § 706 of the Act , 47 U.S.C. § 606, and under § 302(e) of the Aviation Act of 1958, 49 U.S.C. § 40107(b) and Executive Order 11161 (as amended by Executive Order 11382); and
- (iii) National Security and Emergency Preparedness rules, regulations and orders issued pursuant to the Act , 47 U.S.C. § 151 et seq.

2.3. Information Storage and Access. Domestic Communications Companies, effective upon execution of this Agreement by all Parties, shall store exclusively in the United States the following:

- (i) stored Domestic Communications, if such communications are stored by or on behalf of a Domestic Communications Company for any reason;
- (ii) any Wire Communications or Electronic Communications (including any other type of wire, voice or electronic communication not covered by the definitions of Wire Communication or Electronic Communication) received by, intended to be received by, or stored in the account of a customer or subscriber of a Domestic Communications Company, if such communications are stored by or on behalf of a Domestic Communications Company for any reason;
- (iii) Transactional Data and Call Associated Data relating to Domestic Communications, if such data are stored by or on behalf of a Domestic Communications Company for any reason;
- (iv) Subscriber Information, if such information is stored by or on behalf of a Domestic Communications Company for any reason, concerning customers who are U.S.-domiciled, customers who hold themselves out as being U.S.-domiciled, and customers who make a Domestic Communication;
- (v) billing records of customers who are U.S.-domiciled, customers who hold themselves out as being U.S.-domiciled, and customers who make a Domestic Communication, for so long as such records are kept and at a minimum for as long as such records are required to be kept pursuant to applicable U.S. law or this Agreement; and
- (vi) Network Management Information, provided, however, that a duplicate copy of such Network Management Information may be maintained at DCM's headquarters at Sanno Park Tower 2-11-1, Nagata-cho, Chiyoda-ku Tokyo 100-6150, Japan.

The phrase "on behalf of" as used in this Section does not include entities with which a Domestic Communications Company has contracted for peering, interconnection, roaming, long

distance, or other similar arrangements on which the Parties may agree.

2.4. Billing Records. Domestic Communications Companies shall store for at least 18 months all billing records described in Section 2.3(v) above. Nothing in this paragraph shall require Domestic Communications Companies to store such records for longer than 18 months.

2.5. Storage Pursuant to 18 U.S.C. § 2703(f). Upon a request made pursuant to 18 U.S.C. § 2703(f) by a Governmental Authority in the United States to preserve any information in the possession, custody, or control of Domestic Communications Companies that is enumerated in Section 2.3 above, Domestic Communications Companies shall store such information in the United States.

2.6. Compliance with U.S. Law. Nothing in this Agreement shall excuse a Domestic Communications Company from any obligation it may have to comply with U.S. legal requirements for the retention, preservation, or production of such information or data. Similarly, in any action to enforce Lawful U.S. Process, Domestic Communications Companies have not waived any legal right they might have to resist such process.

2.7. Routing of Domestic Communications. Except for routing of traffic (i) from or to U.S. states, territories and possessions outside the Continental United States, (ii) to avoid network disruptions, (iii) consistent with least-cost routing practices and (iv) as otherwise may be agreed in writing by the DOJ, the FBI and the DHS, Domestic Communications Companies shall not route Domestic Communications outside the United States.

2.8. CPNI. Domestic Communications Companies shall comply, with respect to Domestic Communications, with all applicable FCC rules and regulations governing access to and storage of Customer Proprietary Network Information (“CPNI”), as defined in 47 U.S.C. § 222(h)(1).

2.9. Storage of Protected Information. The storage of Classified, Controlled Unclassified, and Sensitive Information by a Domestic Communications Company or its contractors at any location outside of the United States is prohibited, unless the storage is at a U.S. military facility, a U.S. Embassy or Consulate or other location occupied by a U.S. government organization.

### ARTICLE 3: SECURITY

3.1. Measures to Prevent Improper Use or Access. Domestic Communications Companies shall take all reasonable measures to prevent the use of or access to the Domestic Communications Infrastructure to conduct Electronic Surveillance, or to obtain or disclose Domestic Communications, Classified Information, Sensitive Information, or Controlled Unclassified Information, in violation of any U.S. Federal, state, or local laws or the terms of this Agreement. These measures shall include creating and complying with detailed technical, organizational, operational, and personnel controls, policies and written procedures, necessary implementation plans, and physical security measures.

3.2. Visitation Policy. A Domestic Communications Company shall adopt and implement a visitation policy within ninety (90) days of the Effective Date. The policy shall apply to all

visits by non-U.S. persons to Domestic Communications Infrastructure, except for Routine Business Visits, as defined in Section 3.3 below. A Domestic Communications Company shall consult with the DHS in the design and implementation of its visitation policy. The visitation policy shall require that:

- (i) the Security Officer shall review and approve or disapprove requests for visits to Domestic Communications Infrastructure (provided that, with respect to carrier hotels and other shared facilities, this policy will apply solely to the portion of the facility controlled by a Domestic Communications Company) by all non-U.S. persons, organizations or entities (“Visits”). The Security Officer shall approve or disapprove Visit requests on the basis of their consistency with the visitation policy; the Security Officer may specifically deny any Visit request on security or related grounds, which will be described more fully in the visitation policy.
- (ii) a written request for approval of a visit must be submitted to the Security Officer no less than seven (7) days prior to the date of the proposed visit. If a written request cannot be provided within seven (7) days of the proposed visit because of an unforeseen exigency, the request may be communicated via telephone to the Security Officer and immediately confirmed in writing; however, the Security Officer may refuse to accept any request submitted less than seven (7) days prior to the date of such proposed Visit if the Security Officer determines that there is insufficient time to consider the request.
- (iii) each request shall set forth the exact purpose and justification for the Visit in sufficient detail to enable the Security Officer to make an informed decision concerning the appropriateness of the proposed visit. The Security Officer may refuse to accept any request that he or she believes lacks sufficient information. Each proposed Visit and each individual visitor must be justified and a separate approval request must be submitted for each visit, unless the Security Officer agrees to approve multiple visits by the same person or persons for the same purpose, for a period not to exceed sixty (60) days.
- (iv) the Security Officer shall evaluate the request as soon as practicable after receiving it. The Security Officer may approve or disapprove the request pending submittal of additional information by the requester. When practicable, the Security Officer’s decision shall be communicated to the requester by any means at least one (1) day prior to the date of the proposed Visit, and, in all cases, the decision shall be confirmed in writing as promptly as possible.
- (v) a record of all Visit requests, including the decision to approve or disapprove, and information regarding consummated Visits, such as date and place, as well as the names, business affiliation and dates of birth of the visitors, and the Domestic Communications Company personnel involved, shall be maintained by the Security Officer. In addition, a chronological file of all documentation associated with such Visits, together with records of approvals and disapprovals, shall be maintained for two (2) years by the Security Officer for provision at the request of

the DOJ, FBI or DHS.

- (vi) visitors be escorted at all times by an employee, and within conditions, including appropriate restrictions on access, set forth by the Security Officer that are commensurate with the place and purpose of the Visit.

3.3. Routine Business Visits. Notwithstanding Section 3.2, Routine Business Visits, as defined below, may occur without prior approval by the Security Officer. A record of Routine Business Visits, including a log that contains the names of the visitors, their business affiliations, and the purpose of their visits, shall be maintained by the Security Officer for a period of at least two (2) years from the date of the Visit itself. "Routine Business Visits" are those that: (a) are made in connection with the regular day-to-day business operations of a Domestic Communications Company; (b) do not involve the transfer or receipt of any information regarding the security of such facilities; and (c) pertain only to the commercial aspects of a Domestic Communications Company's business. These may include, but not limited to:

- (i) visits for the purpose of discussing or reviewing such commercial subjects as company performance versus plans or budgets; inventory, accounts receivable, accounting and financial controls; and business plans and implementation of business plans;
- (ii) visits of the kind made by customers or commercial suppliers in general regarding the solicitation of orders, the quotation of prices, or the provision of products and services on a commercial basis; and
- (iii) visits concerning fiscal, financial, or legal matters involving a Domestic Communications Company.

The visitation policy established under Section 3.2 may elaborate on the types of visits that qualify as Routine Business Visits.

3.4. Access by Foreign Government Authority. Domestic Communications Companies shall not, directly or indirectly, disclose or permit disclosure of, or provide access to Domestic Communications, Call Associated Data, Transactional Data, or Subscriber Information stored by or on behalf of a Domestic Communications Company to any person if the purpose of such access is to respond to the legal process or the request of or on behalf of a foreign government, identified representative, component or subdivision thereof without the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any such requests or submission of legal process described in this Section 3.4 of this Agreement shall be reported to the DOJ as soon as possible and in no event later than five (5) business days after such request or legal process is received by and known to the Security Officer. Domestic Communications Companies shall take reasonable measures to ensure that the Security Officer will promptly learn of all such requests or submission of legal process described in this Section 3.4 of this Agreement.

3.5. Disclosure to Foreign Government Authorities. Domestic Communications Companies

shall not, directly or indirectly, disclose or permit disclosure of, or provide access to:

- (i) Classified, Sensitive, or Controlled Unclassified Information; or
- (ii) Subscriber Information, Transactional Data, Call Associated Data, or a copy of any Wire Communications or Electronic Communication, intercepted or acquired pursuant to Lawful U.S. Process to any foreign government, identified representative, component or subdivision thereof without satisfying all applicable U.S. Federal, state and local legal requirements pertinent thereto, and obtaining the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any requests or any legal process submitted by a foreign government, or an identified representative, a component or subdivision thereof to a Domestic Communications Company for the communications, data or information identified in this Section 3.5 of this Agreement that is maintained by a Domestic Communications Company shall be referred to the DOJ as soon as possible and in no event later than five (5) business days after such request or legal process is received, unless the disclosure of the request or legal process would be in violation of an order of a court of competent jurisdiction within the United States. Domestic Communications Companies shall take reasonable measures to ensure that the Security Officer will promptly learn of all such requests or submission of legal process described in this Section 3.5.

3.6. Notification of Access or Disclosure Requests from Foreign Non-Governmental Entities. Within ninety (90) days after receiving legal process or requests from foreign non-governmental entities for access to or disclosure of Domestic Communications, a Domestic Communications Company shall notify the DOJ in writing of such legal process or requests, unless the disclosure of such legal process or requests would be in violation of an order of a court of competent jurisdiction within the United States.

3.7. Security of Lawful U.S. Process. Domestic Communications Companies shall protect the confidentiality and security of all Lawful U.S. Process served upon them and the confidentiality and security of Classified, Sensitive, and Controlled Unclassified Information in accordance with U.S. Federal and state law or regulation and this Agreement. Information concerning Lawful U.S. Process, Classified Information, Sensitive Information, or Controlled Unclassified Information shall be under the custody and control of the Security Officer. With respect to Controlled Unclassified Information, compliance with the ITAR and the EAR shall satisfy the requirements of this Section 3.7.

3.8. Points of Contact. Within fourteen (14) days after the Effective Date, Domestic Communications Companies shall designate in writing to the FBI, DOJ and DHS, one or more nominees already holding U.S. security clearances or which the Domestic Communications Companies have a reasonable basis to believe is eligible to receive U.S. security clearances to serve as points of contact within the United States with the authority and responsibility for accepting and overseeing the carrying out of Lawful U.S. Process on behalf of the Domestic Communications Company. Domestic Communications Companies shall provide in writing in

accordance with Section 5.13 of this Agreement, to the FBI, DOJ and DHS the name and contact information for each point of contact. The points of contact shall be assigned to the Domestic Communications Companies' security office(s) in the United States, shall be available twenty-four (24) hours per day, seven (7) days per week, and shall be responsible for accepting service and maintaining the security of Classified, Sensitive, and Controlled Unclassified Information and any Lawful U.S. Process in accordance with the requirements of U.S. law and this Agreement. The points of contact shall undergo the screening process defined in Section 3.15 of this Agreement. If there is any change in the designated points of contact, Domestic Communications Companies shall notify the FBI, DOJ and DHS immediately in writing, providing updated identity and contact information. Persons serving as points of contact shall be resident U.S. citizens who hold or are eligible to receive U.S. security clearances (which may include interim security clearances), as outlined in Executive Order 12968. Domestic Communications Companies shall comply with any request by a Government Authority in the United States that a background check and/or security clearance process be completed for a designated point of contact.

3.9. Information Security Plan. Domestic Communications Companies shall develop, document, implement, and maintain an information security plan to:

- (i) maintain appropriately secure facilities (e.g., offices) within the United States for the handling and storage of any Classified, Sensitive or Controlled Unclassified Information;
- (ii) take appropriate measures to prevent unauthorized access to data or facilities that might contain Classified, Sensitive, or Controlled Unclassified Information;
- (iii) assign U.S. citizens to positions for which screening is contemplated pursuant to Section 3.12;
- (iv) upon written request from the DOJ, FBI or DHS provide the name, social security number and date of birth of each person who regularly handles or deals with Sensitive Information;
- (v) require that personnel handling Classified Information shall have been granted appropriate security clearances pursuant to Executive Order 12968;
- (vi) provide that the points of contact described in Section 3.8 of this Agreement shall have sufficient authority over any of Domestic Communications Companies' employees who may handle Classified, Sensitive, or Controlled Unclassified Information to maintain the confidentiality and security of such information in accordance with applicable U.S. legal authority and the terms of this Agreement;
- (vii) ensure that the disclosure of or access to Classified, Sensitive, or Controlled Unclassified Information is limited to those who have the appropriate security clearances and authority;

- (viii) establish a formal incident response capability with reference to OMB Circular A-130 and NIST Special Publications 800-3, 800-18 and 800-47; and
- (ix) identify the types of positions that require screening pursuant to Section 3.12, the required rigor of such screening by type of position, and the criteria by which Domestic Communications Companies will accept or reject screened persons (“Screened Personnel”).

3.10. Security Officer Responsibilities and Duties. Within thirty (30) days after the Effective Date, Domestic Communications Companies shall designate, from among the points of contact selected pursuant to Section 3.8, a Security Officer within the United States with the primary responsibility for carrying out the Domestic Communications Company’s obligations under Articles 2, 3 and 5 of this Agreement. The Security officer shall stand in a direct reporting relationship with the Director of Network.

3.11. Disclosure of Protected Data. In carrying out the responsibilities set forth in Section 3.10, the Security Officer shall not directly or indirectly disclose information concerning Lawful U.S. Process, Classified Information, Sensitive Information, or Controlled Unclassified Information to any third party or to any officer, director, shareholder, employee, agent, or contractor of any Domestic Communications Company, including those who serve in a supervisory, managerial or officer role with respect to the Security Officer, unless disclosure has been approved by prior written consent obtained from the FBI, DOJ or DHS, or there is an official need for disclosure of the information in order to fulfill an obligation consistent with the purpose for which the information is collected or maintained. With respect to Controlled Unclassified Information, application for and receipt of an export authorization under the ITAR or the EAR, as appropriate, shall satisfy the requirements of this Section 3.11.

3.12. Screening of Personnel. Each Domestic Communications Company shall implement a thorough screening process through the Security Officer or a reputable third party to ensure that all personnel whose positions involve access to the Domestic Communications Infrastructure that enables those persons to monitor the content of Wire or Electronic Communications (including in electronic storage) or to have access to Network Management Information, Transactional Data, Call Associated Data, or Subscriber Information, persons who have access to Sensitive Information, and security personnel, meet personnel screening requirements commensurate with the risk posed to national security by their access to facilities, equipment, or information subject to this Agreement.

- (i) Domestic Communications Companies shall consult with the DOJ, FBI and DHS on the screening procedures required under this Section. The DOJ, FBI and DHS shall take into consideration Domestic Communications Companies’ current and proposed screening procedures in its determination of such screening procedures, which shall be consistent with the guidance to U.S. government agencies under Executive Order 10450, and agrees to provide a list of positions subject to screening under this Section to the DOJ, FBI and DHS. The parties shall categorize the positions according to the risk posed to national security by the level of access to facilities, equipment, and information subject to this Agreement

and shall agree upon the level of screening necessary to satisfy this Section for each access level. Upon request, a Domestic Communications Company shall provide to the investigation services of the DOJ, FBI and DHS, or, in the alternative, to the investigation service of the United States office of Personnel Management (“OPM”), all the information it collects in its screening process of each candidate. Candidates for these positions shall be informed, and shall consent, that the information collected during the screening process may be provided to the U.S. government. Current and newly hired personnel subject to screening will be required to sign a non-disclosure agreement approved in advance by the DOJ, FBI and DHS.

- (ii) If the DOJ, FBI or DHS so desires, it may on its own, or through OPM’s investigations service, conduct further background checks on screened personnel. Domestic Communications Companies will cooperate with any U.S. government agency undertaking any such further background checks.
- (iii) Individuals who are rejected by a Domestic Communications Company under the screening requirements of this Section will not be hired, or, if they have begun their employment, will be immediately removed from their positions, or otherwise have their duties immediately modified so that they are no longer performing a function that would require screening under this Section. Any rejection, pursuant to a request for further background screening under 3.12 (ii) by the DOJ, FBI, or DHS, shall be provided in writing to the Domestic Communications Company within a reasonable time, no longer than thirty (30) days after receipt of the request for further screening, in accordance with Section 5.13. Domestic Communications Companies will notify the DOJ, FBI and DHS of the transfer, departure, or job modification of any individual rejected as a result of the screening conducted pursuant to this Section within seven (7) days of such transfer or departure, and shall provide the DOJ, FBI and DHS with the name, date of birth and social security number of such individual.
- (iv) Domestic Communications Companies shall provide training programs to instruct screened personnel as to their obligations under the Agreement and the maintenance of their trustworthiness determination or requirements otherwise agreed upon. Domestic Communications Companies shall monitor on a regular basis the status of screened personnel, and shall remove screened personnel who no longer meet the screened personnel requirements.
- (v) Domestic Communications Companies shall maintain records relating to the status of screened Personnel, and shall provide these records, upon request, to the DOJ, FBI, or DHS.

3.13. Qualification and Responsibilities of Director of Network. No later than thirty (30) days after the execution of this Agreement, Domestic Communications Companies shall notify the FBI, DOJ and DHS of the identity of the Director of Network. The Director of Network shall be subject to all of the requirements of the points of contact in Section 3.8, including the screening

requirements of Section 3.12 of this Agreement. The Director of Network shall have direct management oversight of the Domestic Communications Infrastructure. A Domestic Communications Company shall have the right to remove the Director of Network at any time and to appoint a replacement, subject to the terms of this Section. If the holder of the position of Director of Network changes, the Domestic Communications Company shall notify the FBI, DOJ and DHS immediately in writing, providing updated identity and contact information. In no event shall a vacancy for the position of Director of Network exist for a period of more than ninety (90) days before the Domestic Communications Company appoints a qualified candidate to fill such vacancy.

3.14. Approval of Acquisition. Acquiring or upgrading network hardware (*e.g.*, routers, switches, servers and network transmission capability) and network operating systems software requires prior approval of a Director of Network, unless subject to other procedures pursuant to a policy to be negotiated with DHS. That policy may provide for simplified procedures for non-sensitive acquisitions and upgrades (*e.g.*, vetting by the Director of Network).

3.15. Operational Control of a Domestic Communications Company Network. Except to the extent and under conditions concurred in by the FBI, DOJ and DHS in writing, operational control of the Domestic Communications Infrastructure will be restricted to Domestic Communications Company facilities located in the United States.

3.16. Notice of Obligations. Domestic Communications Companies shall instruct appropriate officials, employees, contractors, and agents as to the security restrictions and safeguards imposed by this Agreement, including the reporting requirements in Sections 5.2, 5.5, and 5.6 of this Agreement, and shall issue periodic reminders to them of such obligations.

3.17. Access to Classified, Controlled Unclassified, or Sensitive Information. Nothing contained in this Agreement shall limit or affect the authority of a U.S. government agency to deny, limit or revoke Domestic Communications Companies' access to Classified, Controlled Unclassified, and Sensitive Information under that agency's jurisdiction.

#### ARTICLE 4: DISPUTES

4.1. Informal Resolution. The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement. Disagreements shall be addressed, in the first instance, at the staff level by the Parties designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to the President of a Domestic Communications Company, the General Counsel of the FBI, and the Deputy Attorney General, Criminal Division, DOJ, and the General Counsel of DHS or their designees, unless the FBI, DOJ, or DHS believes that important national interests can be protected, or a Domestic Communications Company believes that its paramount commercial interests can be resolved, only by resorting to the measures set forth in Section 4.2 of this Agreement. If, after meeting with higher authorized officials, any of the Parties determines that further negotiation would be fruitless, then that Party may resort to the remedies set forth in Section 4.2 of this Agreement. If resolution of a disagreement requires access to Classified Information, the Parties shall designate a person or persons possessing the appropriate security clearances for the purpose of resolving

that disagreement.

4.2. Enforcement of Agreement. Subject to Section 4.1 of this Agreement, if any of the Parties believes that any other of the Parties has breached or is about to breach this Agreement, that Party may bring an action against the other Party for appropriate judicial relief. Nothing in this Agreement shall limit or affect the right of a U.S. government agency to:

- (i) require that the Party or Parties believed to have breached, or about to breach, this Agreement cure such breach within thirty (30) days upon receiving written notice of such breach;
- (ii) request that the FCC modify, condition, revoke, cancel or render null and void any license, permit, or other authorization granted or given by the FCC to any Domestic Communications Company, or request that the FCC impose any other appropriate sanction, including but not limited to a forfeiture or other monetary penalty, against any Domestic Communications Company;
- (iii) seek civil sanctions for any violation by any Domestic Communications Company of any U.S. law or regulation or term of this Agreement;
- (iv) pursue criminal sanctions against any Domestic Communications Company, or any director, officer, employee, representative, or agent of a Domestic Communications Company, or against any other person or entity, for violations of the criminal laws of the United States; or
- (v) seek suspension or debarment of any Domestic Communications Company from eligibility for contracting with the U.S. government.

4.3. Irreparable Injury. GC and DCMG agree that the United States would suffer irreparable injury if for any reason a Domestic Communications Company failed to perform any of its material obligations under this Agreement, and that monetary relief would not be an adequate remedy. Accordingly, GC and DCMG agree that, in seeking to enforce this Agreement against a Domestic Communications Company, the FBI, DOJ and DHS shall be entitled, in addition to any other remedy available at law or equity, to specific performance and immediate injunctive or other equitable relief.

4.4. Waiver. The availability of any civil remedy under this Agreement shall not prejudice the exercise of any other civil remedy under this Agreement or under any provision of law, nor shall any action taken by a Party in the exercise of any remedy be considered a waiver by that Party of any other rights or remedies. The failure of any Party to insist on strict performance of any of the provisions of this Agreement, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver; rather, the provision or right shall continue in full force. No waiver by any Party of any provision or right shall be valid unless it is in writing and signed by the Party.

4.5. Forum Selection. It is agreed by and among the Parties that a civil action among the

Parties for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement shall be brought, if at all, in the United States District Court for the District of Columbia.

4.6. Effectiveness of Article 4. This Article 4, and the obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties.

#### **ARTICLE 5: AUDITING, REPORTING, NOTICE AND LIMITS**

5.1. Filings re *de jure* or *de facto* control of a Domestic Communications Company. If any Domestic Communications Company makes any filing with the FCC or any other Governmental Authority relating to the *de facto* or *de jure* control of a Domestic Communications Company except for filings with the FCC for assignments or transfers of control that are *pro forma*, the Domestic Communications Company shall promptly provide to the FBI, DOJ and DHS written notice and copies of such filing. This Section 5.1 is effective upon execution of this Agreement by all the Parties.

5.2. Control of a Domestic Communications Company. If any of the senior management of a Domestic Communications Company (including the President, Director of Network, Chief Operating Officer, Security Officer or other senior officer) acquires any information that reasonably indicates that any single foreign entity or individual, other than DCMG has obtained or will likely obtain an ownership interest (direct or indirect) in a Domestic Communications Company above ten (10) percent, as determined in accordance with 47 C.F.R. § 63.09, or if any single foreign entity or individual has gained or will likely otherwise gain either (1) Control or (2) *de facto* or *de jure* control of a Domestic Communications Company, then such member shall promptly cause to be notified the Security Officer, who in turn, shall promptly notify the DOJ, FBI and DHS in writing. Notice under this section shall, at a minimum:

- (i) Identify the entity or individual(s) (specifying the name, addresses and telephone numbers of the entity);
- (ii) Identify the beneficial owners of the increased or prospective increased interest in a Domestic Communications Company by the entity or individual(s) (specifying the name, addresses and telephone numbers of each beneficial owner); and
- (iii) Quantify the amount of ownership interest in a Domestic Communications Company that has resulted in or will likely result in the entity or individual(s) increasing the ownership interest in or control of a Domestic Communications Company.

5.3. Joint Ventures. A Domestic Communications Company may have entered into or may enter into joint ventures under which the joint venture or entity may provide Domestic Communications.

- (i) To the extent that such Domestic Communications Company does not have *de facto* or *de jure* control over a joint venture or entity, such Domestic

Communications Company shall in good faith (a) notify such entity of this Agreement and its purposes, (b) endeavor to have such entity comply with this Agreement as if it were as a Domestic Communications Company, and (c) consult with the DOJ, FBI, or DHS about the activities of such entity. Nothing in this Section 5.3 shall be construed to relieve Domestic Communications Companies of obligations under Article 2 of this Agreement.

- (ii) If a Domestic Communications Company enters into joint venture under which the joint venture or entity may provide Domestic Communications or transmission, switching, bridging, routing equipment (including software and upgrades), facilities used to provide, process, direct, control, supervise or manage Domestic Communications, the Domestic Communications Company must provide DHS with notice no later than 30 days before the joint venture offers Domestic Communications service. DHS will have 30 days from receipt of the notice to review and provide the Domestic Communications Company with any objection to the joint venture. Any objection shall be based on national security, law enforcement or public safety grounds. If the DHS objects, the joint venture shall not offer Domestic Communications service.

5.4. Outsourcing. If a Domestic Communications Company contracts for functions covered by this Agreement to a third party, the Domestic Communications Company shall take reasonable steps to ensure that the third party complies with the applicable terms of this Agreement with respect to functions covered by this Agreement. Such steps shall include, at a minimum:

- (i) the Domestic Communications Company shall disclose this Agreement in its entirety and shall discuss with the third party those specific obligations of the Domestic Communications Company under the Agreement that relate to the contracted-for services;
- (ii) the Domestic Communications Company shall promptly thereafter provide a concise report in writing, to the DHS, DOJ, and FBI setting forth, as to each such specific obligation of the Domestic Communications Company under the Agreement, the commitments on the third party that will ensure the Domestic Communications Company's compliance with each of its obligations;
- (iii) the Domestic Communications Company shall notify the DHS, DOJ, and FBI no later than thirty (30) days before contracting out any function covered by this Agreement to a third Party that is identified, after reasonable inquiry by the Domestic Communications Company, as either Controlled by one or more foreign persons or combination of foreign persons under common Control, or ten (10) percent or more of whose voting equity is held, directly or indirectly, by one or more foreign persons or combination of foreign persons under common Control, which notice shall identify the name of the entity, state the functions covered by this Agreement to be performed under the contract, and include the report required under Section 5.4(ii) above. The DHS will have thirty (30) days from

receipt of the notice to review and provide the Domestic Communications Company with any objection to the contract. Any objection shall be based on national security, law enforcement, or public safety grounds. If the DHS objects in accordance with this Section, the Domestic Communications Company shall not proceed with execution or performance of the contract;

- (iv) the Domestic Communications Company shall include, in all contracts to perform functions covered by this Agreement with third parties that are either Controlled by, or have ten (10) Percent or more of their voting equity held, directly or indirectly, by one or more foreign persons or combination of foreign persons under common Control, written provisions requiring the following:
- (a) The third party shall execute a nondisclosure agreement in a form approved by the DOJ, FBI and DHS which will include provisions barring disclosure of information obtained pursuant to the contract to any other person without the prior written permission of the Domestic Communications Company, and holding the third Party liable for disclosure violations committed by any of its agents including directors, officers, employees, representatives or contractors;
  - (b) To the extent that the third party or any employee or agent of such third party has security responsibilities, or has access to the Domestic Communications Infrastructure that enables those persons to monitor the content of Wire or Electronic Communications (including in electronic storage) or to obtain Network Management Information, such persons shall be subject to personnel screening, consistent with the level of screening required under Section 3.12 of this Agreement for Domestic Communications Company personnel with similar access;
  - (c) To the extent that the third party or any employee or agent of such third party has access to Transactional Data, Call Associated Data or Subscriber Information, such persons shall be specifically identified to the Domestic Communications Company including each individual's name, date of birth, nationality, Passport number (if applicable), and social security number (or equivalent), and the Domestic Communications Company shall retain the right to receive and review such identifying information, to provide it to the DOJ, FBI, or DHS upon their written request, and to exclude individuals from having access to its Transactional Data, Call Associated Data or Subscriber Information;
  - (d) Performance of the contract may not be assigned, delegated, or transferred to any other person or entity;
  - (e) Such contracts shall be subject to U.S. law and the third party shall consent to the jurisdiction of the U.S. federal courts in the District of Columbia for enforcement of the contract;

- (v) if the Domestic Communications Company receives information that reasonably indicates that the third party or any employee or agent has taken an action that, had it been committed by the Domestic Communications Company, would violate an applicable provision of this Agreement, or has violated its obligations to the Domestic Communications Company related to this Agreement, the Domestic Communications Company will notify the DOJ, FBI and DHS promptly, and with consultation and, as appropriate, cooperation with the DOJ, FBI and DHS, the Domestic Communications Company will take reasonable steps necessary to rectify the situation promptly, which steps may include (among others) terminating the outsourcing arrangement with the third party, including after notice and opportunity for cure, or initiating and pursuing litigation or other remedies at law and equity; provided, however, that the Domestic Communications Company shall not contract for functions covered by this Agreement to any entity where, as a result of such contract, the entity would gain access to Sensitive Information.

Provided, however, the following types of outsourcing agreements are deemed to be routine and of a non-sensitive nature and shall be excluded from the obligations set forth in this section regarding outsourcing: (i) radio frequency ("RF") design and engineering; (ii) purchase of equipment from equipment suppliers; (iii) base station facility construction; and (iv) procurement of billing services. The Parties agree to discuss the exclusion of other classes of outsourcing contracts of a routine and non-sensitive nature.

Peering, interconnection, roaming, long distance, or other similar arrangements on which the parties may agree shall not constitute outsourced functions for purposes of this Section.

For preexisting contracts that were in force before the Effective Date, the Domestic Communications Company shall use its commercially reasonable efforts to obtain the third party's commitments to comply with all applicable undertakings set forth in this Section 5.4, and shall promptly thereafter provide to the DHS, DOJ, and FBI the report required under Section 5.4(ii) above. The applicable provisions of this Section 5.4 shall apply in full to proposed contracts that were not signed as of Effective Date, and also to preexisting contracts as they become subject to termination, renewal, or renegotiation of material terms after Effective Date.

5.5. Notice of Foreign Influence. If any member of the management of DCMG or a Domestic Communications Company (including the President, Chief Operating Officer, Director of Network, Security Officer or other senior officer) acquires any information that reasonably indicates that any foreign government, any foreign government controlled entity, or any foreign entity:

- (i) plans to participate or has participated in any aspect of the day-to-day management of a Domestic Communications Company in such a way that interferes with or impedes the performance by a Domestic Communications Company of its duties and obligations under the terms of this Agreement, or interferes with or impedes the exercise by a Domestic Communications Company

of its rights under this Agreement, or

- (ii) plans to exercise or has exercised, as a direct or indirect shareholder of a Domestic Communications Company, any Control of a Domestic Communications Company in such a way that interferes with or impedes the performance by a Domestic Communications Company of its duties and obligations under the terms of this Agreement, interferes with or impedes the exercise by a Domestic Communications Company of its rights under the terms of this Agreement, or in such a way that foreseeably concerns a Domestic Communications Company's obligations under this Agreement,

then such member shall promptly cause to be notified the Security Officer who in turn, shall promptly notify the FBI, DOJ and DHS in writing of the timing and the nature of the foreign government's or entity's plans and/or actions.

5.6. Reporting of Incidents. Domestic Communications Companies shall take practicable steps to ensure that, if any Domestic Communications Company officer, director, employee, contractor or agent acquires any information that reasonably indicates: (a) a breach of this Agreement; (b) access to or disclosure of Domestic Communications, or the conduct of Electronic Surveillance, in violation of Federal, state or local law or regulation; (c) access to or disclosure of CPNI or Subscriber Information in violation of Federal, state or local law or regulation (except for violations of FCC regulations relating to improper commercial use of CPNI); or (d) improper access to or disclosure of Classified, Sensitive, or Controlled Unclassified Information, then the individual will notify the Security Officer, who will in turn notify the FBI and the DOJ in the same manner as specified in Section 5.5. This report shall be made no later than ten (10) calendar days after the Domestic Communications Company acquires information indicating a matter described in this Section 5.6(a)-(d) of this Agreement. The Domestic Communications Company shall lawfully cooperate in investigating the matters described in this section of this Agreement. The Domestic Communications Company need not report information where disclosure of such information would be in violation of an order of a court of competent jurisdiction in the United States.

5.7. Non-Retaliation. Each Domestic Communications Company shall, by duly authorized action of its President, ratified by its Board of Directors, adopt and distribute an official corporate policy that strictly prohibits a Domestic Communications Company from discriminating or taking any adverse action against any officer, director, employee, contractor or agent because he or she has in good faith initiated or attempted to initiate a notice or report under Sections 5.2, 5.5 or 5.6 of this Agreement, or has notified or attempted to notify directly the Security Officer named in the policy to convey information that he or she believes in good faith would be required to be reported to the FBI, DOJ and DHS by the Security Officer under Sections 5.2, 5.5 or 5.6 of this Agreement. Such corporate policy shall set forth in a clear and prominent manner the contact information for the Security Officer to whom such contacts may be made directly by any officer, director, employee, contractor or agent for the purpose of such report or notification. Any violation by a Domestic Communications Company of any material term of such corporate policy shall constitute a breach of this Agreement.

5.8. Third Party Audits. Domestic Communications Companies shall retain and pay for a neutral third party to conduct audits objectively on an annual basis to assess its compliance with the terms of this Agreement, and shall furnish to the DOJ, FBI and DHS a report in accordance with Section 5.11. Domestic Communications Companies shall provide notice of its selected auditor to the DOJ, FBI and DHS, and the DOJ, FBI and DHS shall be able to review and approve or disapprove the selected auditor within thirty (30) days of receiving notice. Domestic Communications Companies shall provide DOJ, FBI and DHS with a description of the scope and purpose of the audits at least three (3) months in advance of commencing an audit, and DOJ, FBI and DHS shall have the right to review and approve the terms defining the scope and purpose of the audits. Domestic Communications Companies shall ensure that the auditor has full and unimpeded corporate authority to conduct the audits without restriction or limitation by any officer, director, employee, contractor or agent of the Domestic Communications Company. The terms defining the scope and purposes of the audits shall include, at a minimum, authority for the auditor (a) to review and analyze the Domestic Communications Company's policies and procedures designed to implement this Agreement, all relevant information related to the configuration of the Domestic Communications Company's network, all minutes of meetings held or actions taken by the Domestic Communications Company's Board of Directors or Committees of the Board in accordance with this Agreement, an Security officer logs and records including records related to facility visits, personnel screening data, and any reports submitted in accordance with Section 5.9 of this Agreement; and (b) to conduct a reasonable number of unannounced inspections of the Domestic Communications Company's facilities each year, a reasonable volume of random testing of network firewalls, access points and other systems for potential vulnerabilities, and a reasonable number of confidential interviews of the Domestic Communications Company's officers, directors, employees, contractors or agents concerning compliance with this Agreement. Upon request, the Domestic Communications Company shall provide the DOJ, FBI or DHS with access to facilities, information, and personnel consistent with Sections 5.10 and 5.11 below in the event that the DOJ, FBI and DHS wishes to conduct its own annual audit of the Domestic Communications Company's compliance with this Agreement.

5.9. Access to Information and Facilities. FBI, DOJ and DHS may visit with reasonable advance notice any part of a Domestic Communications Company's Domestic Communications Infrastructure and security offices to conduct on-site reviews concerning the implementation of the terms of this Agreement and may at any time require unimpeded access to information concerning technical, physical, management, or other security measures needed by the FBI, DOJ, or DHS to verify compliance with the then-effective terms of this Agreement.

5.10. Access to Personnel. Upon reasonable notice from the FBI, DOJ, or DHS, Domestic Communications Companies will make available for interview officers or employees of Domestic Communications Companies, and will require contractors to make available appropriate personnel located in the United States who are in a position to provide information to verify compliance with the terms of this Agreement; provided that the Parties shall, in good faith, take into consideration the actual availability of the necessary individuals.

5.11. Annual Report. On or before the last day of January of each year after the Effective Date, the Chief Executive Officer, President or other designated senior corporate officer of the Domestic Communications Companies shall submit to the FBI, DOJ and DHS a report assessing

the Domestic Communications Companies compliance with the terms of this Agreement for the preceding calendar year. The report shall include:

- (i) a copy of Security audit reports compiled by the third party auditor conducted pursuant to Section 5.8 of this Agreement;
- (ii) a copy of the policies and procedures adopted to comply with this Agreement;
- (iii) a summary of the changes, if any, to the policies or procedures, and the reasons for those changes;
- (iv) a summary of any known acts of material noncompliance with the terms of this Agreement, whether inadvertent or intentional, with a discussion of what steps have been or will be taken to prevent such acts from occurring in the future; and
- (v) identification of any other issues that, to the Domestic Communications Company's knowledge, will or reasonably could affect the effectiveness of or compliance with this Agreement.

All Domestic Communications Companies shall make available to the Security Officer, in a timely fashion, all information necessary to complete the report required by this Section.

5.12. Information and Reports Concerning Network Architecture. If requested by the DOJ, FBI and DHS, Domestic Communications Company shall provide to the DOJ, FBI and DHS, the following information regarding the interconnections and control of the Domestic Communications Infrastructure:

- (i) A description of the plans, processes and/or procedures, relating to network management operations that prevent the Domestic Communications Infrastructure from being accessed or controlled from outside the United States.
- (ii) A description of the placement of Network Operations Centers and interconnection (for service offload or administrative activities) to other domestic and international carriers, ISPs and critical U.S. financial, energy, and transportation infrastructures.
- (iii) A description of the Domestic Communications Company's IP networks and operations processes, procedures for management control and relation to the backbone infrastructures of other service providers.
- (iv) A description of any unique or proprietary control mechanisms of the Domestic Communications Company as well as of the Domestic Communications Company's operating and administrative software.
- (v) A report of Network Management Information that includes an assurance that network performance satisfies FCC rules and reporting requirements.

Once a report has been made under this Section 5.12, the Domestic Communications Company shall promptly report any material changes, upgrades and/or modifications to the items described in (i) - (v) above, including the installation of critical equipment and software. For the purposes of this section, critical equipment and software shall include: routers, switches, gateways, network security appliances, network management/test equipment, operating systems and network and security software (including new versions, patches, upgrades, and replacement software), and other hardware, software, or systems performing similar functions. Monitors, desktop computers, desktop computer applications, disk drives, power supplies, printers, racks and the like are not "critical equipment or software" unless they perform functions similar to those of the items described in (i) - (v) above. Similarly, "material" shall refer to those changes, modifications and upgrades that alter network operating characteristics or architecture -- it does not apply to spare parts replacement, the one-for-one swapping of identical equipment or the related re-loading of system software or backups; provided, however, that network security configuration and capabilities remain unchanged.

5.13. Notices. Effective upon execution of this Agreement by all the Parties, all notices and other communications given or made relating to this Agreement, such as a proposed modification, shall be in writing and shall be deemed to have been duly given or made as of the date of receipt and shall be (a) delivered personally, or (b) sent by facsimile, or (except as noted below) (c) sent by documented overnight courier service, or (d) sent by registered or certified mail, postage prepaid, addressed to the Parties' designated representatives at the addresses shown below, or to such other representatives at such others addresses as the Parties may designate in accordance with this Section:

Department of Justice  
Assistant Attorney General  
Criminal Division  
Main Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530  
Federal Bureau of Investigation  
General Counsel  
935 Pennsylvania Avenue, N.W.  
Washington, DC 20535

Department of Homeland Security  
Washington, D.C. 20528  
Attn: General Counsel, Office of the General Counsel  
Telephone: 202-692-4237  
Fax: 202-282-8415  
(By Personal Delivery or E-mail Only)

Federal Bureau of Investigation  
The Assistant Director  
National Security Division

935 Pennsylvania Avenue, N.W.  
Washington, DC 20535

Guam Cellular and Paging, Inc.  
Attn: President  
Century Plaza  
219 South Marine Drive, Suite 206  
Tamining, Guam 96913  
Telephone: 671-688-6400  
Fax: 671-649-7247

DoCoMo Guam Holdings, Inc.  
Attn: President  
c/o NTT DoCoMo USA, Inc.  
1399 New York Ave., NW Suite 450  
Washington, D.C. 20005.  
Telephone: 202-639-9377  
Fax: 202-639-9588

#### **ARTICLE 6: FREEDOM OF INFORMATION ACT**

6.1. Protection from Disclosure. The DOJ, FBI and DHS shall take all reasonable measures to protect from public disclosure all information submitted by a Domestic Communications Company in accordance with the terms of this Agreement to the DOJ, FBI or DHS in connection with this Agreement and clearly marked with the legend “Confidential; subject to protection under 5 U.S.C. § 552(b); not to be released without notice to the Domestic Communications Company” or similar designation. Such markings shall signify that it is the Domestic Communications Company’s position that the information so marked constitutes “trade secrets” and/or “commercial or financial information obtained from a person and privileged or confidential,” or otherwise warrants protection within the meaning of 5 U.S.C. § 552(b)(4). For the purposes of 5 U.S.C. § 552(b)(4), the Parties agree that information so marked is voluntarily submitted. If a request is made under 5 U.S.C. § 552(a)(3) for information so marked, and disclosure of any information (including disclosure in redacted form) is contemplated, the DOJ, FBI or DHS, as appropriate, shall notify the Domestic Communications Company of the intended disclosure as provided by Executive Order 12600, 52 Fed. Reg. 23781 (June 1987). If the Domestic Communications Company objects to the intended disclosure and its objections are not sustained, the DOJ, FBI, or DHS, as appropriate, shall notify the company of its intention to release (as provided by Section 5 of Executive Order 12600) not later than five business days prior to disclosure of the challenged information. The Parties note that information submitted by a Domestic Communications Company in accordance with the terms of this Agreement may be protected from disclosure under the Critical Information Infrastructure Act of 2002.

6.2. Use of Information for U.S. Government Purposes. Nothing in this Agreement shall prevent the FBI, DOJ or DHS from lawfully disseminating information as appropriate to seek enforcement of this Agreement, or from lawfully sharing information as appropriate with other Federal, state, or local government agencies to protect public safety, law enforcement, or

national security interests, provided that the FBI, DOJ or DHS take all reasonable measures to protect from public disclosure the information marked as described in Section 6.1.

6.3. Unlawful Disclosure of Information. The DOJ, FBI and DHS acknowledge that officers and employees of the United States and of any department or agency thereof are subject to liability under 18 U.S.C. § 1905 for unlawful disclosure of information provided to them by other Parties to this Agreement.

## ARTICLE 7: FCC CONDITION

7.1. FCC Approval. Upon the execution of this Agreement by all the Parties, the DOJ, FBI and DHS shall promptly notify the FCC that, provided the FCC adopts a condition substantially the same as set forth in Exhibit A attached hereto (the Condition to FCC Authorization.), the DOJ, FBI and DHS have no objection to the FCC's grant of the applications filed with the FCC in FCC IB Docket No. 06-96. This Section 7.1 is effective upon execution of this Agreement by all the Parties.

7.2. Future Applications. DCMG agrees that, in any application or petition by any Domestic Communications Company to the FCC for licensing or other authority filed with or granted by the FCC after the Effective Date, except with respect to *pro forma* assignments or *pro forma* transfers of control, the Domestic Communications Company shall request that the FCC condition the grant of such licensing or other authority on compliance with the terms of this Agreement. Notwithstanding Section 8.9, the FBI, DOJ and DHS reserve the right to object, formally or informally, to the grant of any other FCC application or petition of a Domestic Communications Company for a license or other authorization under Titles II or III of the Communications Act of 1934, as amended, and to seek additional or different terms that would, consistent with the public interest, address any threat to their ability to enforce the laws, preserve the national security, and protect the public safety raised by the transactions underlying such applications or petitions.

## ARTICLE 8: OTHER

8.1. Right to Make and Perform Agreement. DCMG and GC each represent that each has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of DCMG and GC enforceable in accordance with its terms.

8.2. Headings. The Article headings and numbering in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of the terms of this Agreement.

8.3. Other Laws. Nothing in this Agreement is intended to limit or constitute a waiver of (a) any obligation imposed by any U.S. Federal, state or local laws on DCMG or GC, (b) any enforcement authority available under any U.S. or state laws, (c) the sovereign immunity of the United States, or (d) any authority the U.S. government may possess (including without limitation authority pursuant to International Emergency Economic Powers Act) over the

activities of DCMG or GC. Nothing in this Agreement is intended to or is to be interpreted to require the Parties to violate any applicable U.S. law.

8.4. Statutory References. All references in this Agreement to statutory provisions shall include any future amendments to such statutory provisions.

8.5. Non-Parties. Nothing in this Agreement is intended to confer or does confer any rights on any person other than the Parties and any Governmental Authorities entitled to effect Electronic Surveillance pursuant to Lawful U.S. Process.

8.6. Modifications. This Agreement may only be modified by written agreement signed by all of the Parties. The DOJ, FBI and DHS agree to consider in good faith and promptly possible modifications to this Agreement if DCMG or GC believes that the obligations imposed on DCMG or GC under this Agreement are substantially more restrictive than those imposed on other U.S. and foreign licensed service providers in like circumstances in order to protect U.S. national security, law enforcement, and public safety concerns. Any substantial modification to this Agreement shall be reported to the FCC within thirty (30) days after approval in writing by the Parties.

8.7. Changes in Circumstances for DCMG or a Domestic Communications Company. The DOJ, FBI and DHS agree to negotiate in good faith and promptly with respect to any request by DCMG or a Domestic Communications Company for relief from application of specific provisions of this agreement: (a) if the Domestic Communications Company provides Domestic Communications solely through the resale of transmission or switching facilities owned by third parties, or (b) as regards future Domestic Communications Company activities or services, if those provisions become unduly burdensome or adversely affect DCMG's, or the Domestic Communications Company's competitive position.

8.8. Changes in Circumstances for the DOJ, FBI or DHS. If, after the date that all the Parties have executed this Agreement, the DOJ, FBI or DHS finds that the terms of this Agreement are inadequate to address national security, law enforcement, or public safety concerns presented, then the other Parties will negotiate in good faith to modify this agreement to address those concerns. In the event that improvements in technology may enhance the efficacy of this Agreement to protect the national security, enforce the laws or protect the safety of the public, the parties will work promptly to amend the agreement to implement such advances.

8.9. Severability. The provisions of this Agreement shall be severable and if any provision thereof or the application of such provision under any circumstances is held invalid by a court of competent jurisdiction, it shall not affect any other provision of this Agreement or the application of any provision thereof.

8.10. Counterparts. This Agreement may be executed in one or more counterparts, including by facsimile, each of which shall together constitute one and the same instrument.

8.11. Successors and Assigns. This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns.

8.12. Effectiveness of Agreement. Except as otherwise specifically provided in the provisions of this Agreement, the obligations imposed and rights conferred by this Agreement shall take effect upon the Effective Date.

8.13. Termination of Agreement. If the SPA and APA is terminated prior to the Effective Date, DCMG or GC shall promptly provide written notification of such termination to the FBI, DOJ and DHS, and upon receipt of such written notice, this Agreement shall automatically terminate. After the Effective Date, this Agreement shall terminate upon thirty (30) days prior written notice from DCMG or GC to the FBI, DOJ and DHS.

8.14. Suspension of Agreement With Respect to a Domestic Communications Company. This Agreement shall be suspended upon thirty (30) days notice to the DOJ, FBI and DHS with respect to any covered Domestic Communications Company entity if said entity is no longer a Domestic Communications Company.

8.15. Suspension of Agreement If No Significant Foreign Ownership. This Agreement shall be suspended in its entirety with respect to DCMG and all Domestic Communications Companies thirty (30) days after receipt from DCMG or a Domestic Communications Company of notice and documentation reasonably satisfactory to the DOJ, FBI and DHS that neither DCMG nor any other foreign entity either Controls a Domestic Communications Company or holds, directly or indirectly, a ten (10) percent or greater interest in a Domestic Communications Company, unless the DOJ, FBI and DHS notify a Domestic Communications Company within said thirty (30) day period that this Agreement shall not be suspended in order to protect U.S. national security, law enforcement, and public safety concerns. If this Agreement is not suspended pursuant to this provision, the DOJ, FBI and DHS agree to consider promptly and in good faith possible modifications to this Agreement. Notwithstanding anything to the contrary in this Section 8.15, this Agreement shall remain in effect with respect to DCMG and the Domestic Communications Companies for so long as (and the obligations of DCMG and the Domestic Communications Companies shall not be suspended and any suspension of the obligations of GC shall terminate if) DCMG or any other foreign entity shall either Control or hold, at any time does hold, or is a party to an agreement to hold, directly or indirectly, a ten (10) percent or greater ownership interest, as determined in accordance with 47 C.F.R. § 63.09, in any Domestic Communications Company or any transferee or assignee of the FCC licenses or authorizations held by a Domestic Communications Company.

8.16. Pledging of Stock or Assets of a Domestic Communications Company. Nothing in this Agreement shall be interpreted to prevent DCMG from pledging assets of any Domestic Communications Company in connection with the borrowing of funds and similar financial activities by a Domestic Communications Company, nor shall such pledging of stock or assets excuse performance of the obligations in this Agreement by a Domestic Communications Company.

8.17. Effectiveness of Article 8. This Article 8, and the obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties. This Agreement is executed on behalf of the Parties:

This Agreement is executed on behalf of the Parties:

<p>Date: _____</p>	<p><b>Guam Cellular and Paging, Inc.</b></p> <p>By: _____</p> <p>Printed Name:</p> <p>Title:</p>
<p>Date: _____</p>	<p><b>DoCoMo Guam Holdings, Inc.</b></p> <p>By: _____</p> <p>Printed Name:</p> <p>Title:</p>
<p>Date: _____</p>	<p><b>Federal Bureau of Investigation</b></p> <p>By: _____</p> <p>Printed Name:</p> <p>Title:</p>
<p>Date: _____</p>	<p><b>United States Department of Justice</b></p> <p>By: _____</p> <p>Printed Name:</p> <p>Title:</p>
<p>Date: _____</p>	<p><b>United States Department of Homeland Security</b></p> <p>By: _____</p> <p>Printed Name:</p> <p>Title:</p>

**EXHIBIT A**

CONDITION TO FCC AUTHORIZATION IT IS FURTHER ORDERED, that consent to the assignment, transfer of control, and declaratory ruling pursuant to 47 U.S.C. § 310(b)(4) are subject to compliance with the provisions of the Agreement attached hereto among DCMG and GC on the one hand, and the United States Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and the United States Department of Homeland Security (“DHS”), on the other, dated \_\_\_\_\_, which Agreement is designed to address national security, law enforcement, and public safety issues of the DOJ, the FBI and the DHS regarding the authority granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC’s implementing regulations.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Applications of Guam Cellular and Paging, Inc., Guam Wireless Telephone Company, LLC, and DoCoMo Guam Holdings, Inc. for Consent to Transfer Control and Assign Licenses and Authorizations, WT Docket No. 06-96.*

I am always troubled when the Federal Communications Commission allows entities that are substantially owned or controlled by foreign governments to obtain U.S. licenses. As I have stated before, I believe that significant foreign government ownership or control represents a serious potential threat to U.S. consumers and to competition. There is a fundamental difference between companies that operate in a free market and state-run corporations that may act counter to free market forces.

Nevertheless, because the transaction before us promises to bring meaningful benefits to wireless users in Guam and the CNMI, and in light of the relatively modest magnitude of the foreign investment at issue, I concur in today's decision. I do want to emphasize, however, that the Commission must keep a careful eye on future developments in these markets and act swiftly in response to any evidence of anti-competitive or anti-consumer tactics.